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No. 391

United States Court of Appeals

For the Second Circuit.

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

Plaintiffs-Appellants,

against

THE COLORADO FUEL AND IRON CORPORATION, ISBRANDTSEN COMPANY, INC.,

Defendants-Appellees,

and

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Defendant-Appellee-Appellant.

(Civil Action No. 62-10.)

APPENDIX TO PLAINTIFFS-APPELLANTS' BRIEF.

On Appeal From the United States District Court for the Southern District of New York.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1956

Index to Appendix.

	Page
Relevant Docket Entries	1a
Judgment of Dismissal	3a
Opinion	4a
Plaintiffs' Exhibit 1 (In Part)—Stipulation of Facts Identifying Documents	42a
Plaintiffs' Exhibit 2 (In Part)—Badhwar Deposition	51a
Plaintiffs' Exhibit 4 (In Part):	
Becker Deposition	73a
New Orleans Press Reports, in Part	76a
Dalton Deposition	104a
Smith Deposition	109a
Gray Telegram of September 2, 1948	129a
Gray Telegram of September 3, 1948	130a
Plaintiffs' Exhibit 6—Morgan Deposition	96a

TESTIMONY.

Witness for Plaintiffs:

	Page
Conlon, Charles J.:	
Direct by Mr. Dunn	56a
Cross by Mr. Bensel	57a
Cross by Mr. Scott	58a
Cross by Mr. Tillinghast	59a

Witnesses for Defendant Colorado Fuel and Iron Corporation:

Becker, Frederick R., Jr.:	
Direct by Mr. Bensel	60a
Cross by Mr. Tillinghast	66a
Cross by Mr. Dunn	66a
Re-cross by Mr. Dunn	71a
Wire, Ward:	
Direct by Mr. Bensel	92a
Cross by Mr. Dunn	93a

Witness for Defendant Isbrandlsen Company, Inc.:

Crinkley, Matthew S.:	
Direct by Mr. Scott	117a
Cross by Mr. Tillinghast	119a
Cross by Mr. Dunn	121a

Witnesses for Defendant American-Hawaiian Steamship Company:

Bain, Frank H.:	
Direct by Mr. Tillinghast	127a
Cross by Mr. Dunn	128a
Gray, Robert L.:	
Direct by Mr. Tillinghast	123a
Cross by Mr. Dunn	125a

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R. S. DASS BADHWAR and R. B. LACHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

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Relevant Docket Entries.

Date	Filing Proceedings
Oct. 26-50	Filed Complaint and Issued Summons
Dec. 27-50	Filed Answer of Defendant Colorado Fuel & Iron Corp.
Jan. 11-51	Filed Answer of Defendant Isbrandtsen Company, Inc.
Jan. 18-51	Filed Answer of Defendant American Hawaiian S. S. Co. and Cross Claim against defendant Isbrandtsen
Mar. 6-51	Filed Defendant Isbrandtsen's Answer to Cross Claim of American Hawaiian S. S. Co.

Relevant Docket Entries

Dec.	22-52	Filed Depositions of Dalton, et. al.
Dec.	22-52	Filed Exhibit from New Orleans, La.
June	1-53	Filed Stipulation of Facts
Dec.	29-53	Filed "Transcript of Newspaper Stories Re 1948 Maritime Strike, New Orleans, La.
Mar.	16-54	Filed Stip. & Order substituting G. P. Agarwal for V. P. Agarwal
May	12-54	Filed Depositions from Bombay, India
Jan.	3-55	Filed Notice to amend answer upon trial of defendant Isbrandtsen
Jan.	7-55	Filed Notice to amend answer upon trial of defendant Colorado
Jan.	24-55	Filed Notice to amend complaint at trial
Jan.	19-55	Trial begun before Ryan, J.
Sept.	12-55	Filed Opinion dismissing complaint and cross claim
Oct.	10-55	Filed Plaintiffs' Notice of Appeal

[1530]

Judgment of Dismissal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This action having been duly tried before the Court, Honorable Sylvester J. Ryan, United States District Judge, presiding, and the Court having duly rendered its opinion dated September 12, 1955, containing its findings of fact and conclusions of law and directing dismissal of the complaint, without costs, and similar dismissal of the cross-claim of defendant, American-Hawaiian Steamship Company, against defendant, Isbrandtsen Company, Inc., it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs do have and recover nothing from defendants and that the compiaint herein be and the same hereby is dismissed on the merits, without costs, and it is further

ORDERED, ADJUDGED AND DECREED that the cross-claim of defendant, American-Hawaiian Steamship Company, against defendant, Isbrandtsen Company, Inc., be and the same hereby is similarly dismissed, without costs.

Dated, September 21, 1955.

/s/ SYLVESTER J. RYAN,
U. S. D. J.

Judgment entered September 21, 1955.

/s/ WILLIAM C. CONNELL,
Clerk.

[2]

Opinion.

[SAME TITLE.]

RYAN, D. J. Plaintiffs seek in this action money damages in the amount of $203,639.09 which they claim because of defendants' improper shipment and transportation of a purchase caustic soda and the improper issuance and negotiation of two bills of lading relating thereto.

Plaintiffs are citizens and residents of Lucknow, India; Defendant Colorado Fuel and Iron Corporation is a corporation organized under the laws of the State of Colorado; defendant Isbrandtsen Company, Inc., is a corporation organized under the laws of the State of New York; and [3] defendant American-Hawaiian Steamship Company is a corporation organized under the laws of the State of New Jersey. There is complete diversity of citizenship between all plaintiffs and all defendants and the amount in controversy exceeding the sum of $3000, exclusive of interest and costs.[1] None of the parties questions the jurisdiction of this Court.[2]

Plaintiffs alleged in their complaint five causes of action: the first against Colorado for breach of contract; the second against all defendants for negligence in the performance of their various contractual obligations; the third against all defendants for fraud; the fourth against Isbrandtsen and American-Hawaiian for conversion; and the fifth against all defendants for the loss of 60,203.3 pounds of caustic soda which arrived in Bombay in 526 allegedly damaged drums. The first four alleged causes of action all arose out of the same transaction or occurrence and can conveniently be considered together. We will treat these allegations and the evidence submitted in support [4] of them as one claim determining whether

[1] 28 U. S. C. A. 1332(a)(2).

[2] S. M. P. 79.

plaintiffs can recover under any theory.[3] Plaintiffs' counsel has in addition presented his case in this manner.

The contract[5] between the plaintiffs and Colorado came about in the following manner: At the request of Colorado the New York Branch of the National City Bank of New York cabled its Bombay Branch on August 2nd, 1948, that Colorado had an export license for 4300 tons of caustic soda solid, 76% alkalinity, N. Y. & L. test, for immediate delivery at 9 cents per pound FAS Gulf Ports or 10.102 cents per pound CIF Bombay. The New York Branch asked the Bombay Branch to cable if it knew of a buyer who had an import license and who would be able to open a credit at once.[6] On the day following the Bombay Branch advised the New York Branch of the National City Bank that their contacts showed no interest in the Colorado offer, and Colorado was informed of this reply.[7] At the request of Colorado, on August 4th, 1948, the New York Branch cabled the Bombay Branch to continue their endeavors to arouse interest for all or part of the 4300 tons,[8] and on [5] August 5th, 1948, the Bombay Branch cabled the New York Branch as follows:

> "YOUR SIX OUR EIGHT MULKRAJ INTERESTED BUY UP TO TWO THOUSAND LONG TONS CAUSTIC FROM COLORADO PROVIDED PRICE CENT 9.50 PER POUND CIF BOMBAY AND QUALITY EQUAL TO NINETY-EIGHT PERCENT NOAH STOP WORKING."[9]

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[3] Fed. R. Civ. P. 15(b).

[4] *E. g.*, S. M. P. 70, 77-78.

[5] The law of the State of New York is being applied as to whether or not any contract was in fact made by the plaintiffs and Colorado, and as to the construction of that contract upon agreement of counsel for the respective parties. S. M. P. 80.

[6] Plaintiffs' Exhibit 1, Schedule A.

[7] Plaintiffs' Exhibit 1, Schedule B.

[8] Plaintiffs' Exhibit 1, Schedule C.

[9] Plaintiffs' Exhibit 1, Schedule D.

The plaintiffs admit the facts stated in this cablegram to be true; Colorado admits that the contents of the cablegram were communicated to it. On that same day (August 5th) the New York Branch cabled the Bombay Branch that Colorado's best price was 10 cents per pound CIF Bombay.[10] Plaintiffs admit that the contents of this cable were communicated to them. On August 6th the Bombay Branch cabled the New York Branch that plaintiffs insisted upon the 9 1/2 cent price, CIF Bombay, and Colorado admits that it was informed of the contents of this cable.[11] On August 6th, a Friday, at the request of Colorado the New York Branch cabled the Bombay Branch the following:

> "URGENT YOUR ELEVEN AT REQUEST COLORADO FUEL & IRON CORPORATION AND WITHOUT RESPONSIBILITY TO BANK ADVISE MULKRAJ [6] QUOTE COLORADO FUEL & IRON AGREE SALE TWO THOUSAND LONG TONS CAUSTIC SODA SOLID 76% ALKALINITY NY&L TEST PACKED STEEL DRUMS PRICE NINE AND ONE HALF CENTS PER POUND CIF BOMBAY PAYABLE U. S. DOLLAR IRREVOCABLE LETTER OF CREDIT STOP IN ORDER TO EXPEDITE VALIDATION OF EXPORT LICENSE NUMBER PLEASE HAVE BUYER CABLE CONFIRMATION STATING THEIR IMPORT LICENSE NUMBER AND FULL NAME ADDRESS DIRECT TO W. A. BARTLE CARE OF COLORADO FUEL & IRON CORPORATION 1616 EYE STREET WASHINGTON DC STOP HAVE SHIPPING SPACE MINIMUM FIVE HUNDRED TONS FROM NEW ORLEANS ON OR ABOUT AU-

[10] Plaintiffs' Exhibit 1, Schedule E.
[11] Plaintiffs' Exhibit 1, Schedule F.

GUST 22 AND BALANCE WILL BE SHIPPED FROM A GULF PORT BETWEEN SEPTEMBER 15 AND 20. STOP FOR YOUR INFORMATION IT IS IMPOSSIBLE FOR ANYONE OTHER THAN COLORADO FUEL & IRON CORPORATION TO OFFER CAUSTIC SODA OF U.S. ORIGIN TO INDIA AT NINE AND ONE HALF CENTS CIF BOMBAY AS COLORADO AT PRESENT HAVE EXCLUSIVE AUTHORIZED EXPORT LICENSE PLEASE REPLY EARLIEST UNQUOTE.'"[12]

[7] This cablegram was received at the Bombay Branch on August 9th, a Monday, and its contents were communicated to the plaintiffs. On the same day R.S. Dass Badhwar (care Laxmansons) cabled directly to Colorado the following:

"REFERENCE OUR NEGOTIATIONS 2000 TONS CAUSTIC SODA SOLID THROUGH NATIONAL CITY BANK NEW YORK BOMBAY AND YOUR ACCEPTANCE OUR OFFER AT 9.5 CENTS PER LB CIF INDIAN PORT OUR IMPORT LICENSE NUMBER 000417/48 VALID UP TO SEPTEMBER 22 STOP ESTABLISHING LETTER CREDIT YOUR FAVOR THROUGH NATIONAL CITY BANK ON NEW YORK STOP ARRANGE SHIPMENT ENTIRE QUANTITY IN ONE OR MORE LOTS TO CALCUTTA BEFORE ABOVE NOTED DATE STOP CABLE EXPORT LICENSE NUMBER.'"[13]

This cablegram was confirmed by R.S. Dass Badhwar by letter dated August 9th. This letter contains the following language:

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[12] Plaintiffs' Exhibit 1, Schedule G.

[13] Plaintiffs' Exhibit 1, Schedule J.

"* * *

"We also understand from our mutual intermediary that you will ship 500 tons by August 22, [8] 1948 from New Orleans-La and the balance from some port in one or more lots as is convenient to you, but you should complete the entire quantity before September 22, 1948 in any case.

"We have had a very sad experience of dealing with another U. S. firm of New York, who offered us June shipment of 800 tons Caustic Soda and believing on their cable we immediately established a letter of credit in their favor but till now, we have no news of the shipment of the goods. We are therefore rather cautious and if it had not been through the National City Bank of New York, Bombay we would have hesitated to deal with a firm whom we do not know. We trust you won't misunderstand our position. We have therefore to request you to fulfill the contract within the stipulated time and in case you fail in your part, you shall be liable to compensate us for the loss of commission and interest."

"* * *"[14]

[9] A subsequent passage of cables fixed Bombay and not Calcutta as the port of discharge.

On August 12th, 1948 Colorado cabled the plaintiffs:

"HOPE TO LOAD ABOUT 1000 TONS STEAMER JANE G. SWISSHELM LEAVING NEW ORLEANS ABOUT AUGUST 23 STOP WILL CABLE EXACT AMOUNT WHEN LETTER OF CREDIT DEFINITELY CONFIRMED WITH PROPER SHIPPING INSTRUCTIONS CANNOT PROCEED WITH SHIPMENT UNTIL DOCUMENTS PROPERLY PREPARED IN AC-

[14] Plaintiffs' Exhibit 1, Schedule K.

CORDANCE STOP NOW HAVE VALIDATED EXPORT LICENSE FOR 2000 TONS OF MULK-RAJ NUMBER 1385760."[15]

I find that the agreement between the plaintiffs and Colorado although initially requiring shipment of all of the caustic soda on or before September 22nd, 1948[16] was subsequently changed by the parties when the plaintiffs caused two letters of credit to be opened in favor of Colorado and when Colorado accepted payment under the letters of credit. The first letter of credit, which called for payment on one part of this shipment of caustic soda, provided that the bills of lading be dated not later than October 10th, [10] 1948;[17] the second letter of credit, calling for payment of the remainder of this shipment of caustic soda, provided that the bills of lading be dated not later than September 22nd, 1948.[18] Thus, plaintiffs by causing one letter of credit to be valid if bills of lading thereunder were dated before October 10th, 1948 and Colorado by accepting payment under that letter of credit agreed that shipment of one part of the caustic soda could be made as late as October 10th, 1948 (shipment of the other part to be before September 22nd, 1948).

In sum then, the contract between the plaintiffs and Colorado was for the sale of 2000 long tons of caustic soda of a specified type, CIF Bombay, India, at a price of 9 1/2 cents per pound, one part to be shipped not later than September 22nd, 1948, the other part not later than October 10th, 1948.

The claim in this suit is only as to some 1490 tons, the remainder or balance of the contract having been cancelled by the mutual consent of the plaintiffs and defendant Colorado.[19]

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[15] Plaintiffs' Exhibit 1, Schedule T.

[16] Plaintiffs' Exhibit 1, Schedules J and K.

[17] Plaintiffs' Exhibit 1, Schedules U and Z.

[18] Plaintiffs' Exhibit 1, Schedules AF and AH; see also Plaintiffs' Exhibit 1, Schedule AG.

[19] S. M. P. 35-37; Plaintiffs' Exhibit 1, Schedules BE and BF.

[11] The vessel on which the caustic soda was loaded (the S.S. Hawaiian) arrived at Bombay on February 28th, 1949, some six months after it had been loaded. To understand plaintiffs' contentions with respect to this delay, it is necessary that we examine somewhat the conditions affecting the maritime industry in 1948, a year of considerable and widespread labor unrest in that industry.

On June 14th, 1948, a threatened maritime strike on the East, Gulf and West Coasts was temporarily restrained, and subsequently enjoined for a full eighty-day period expiring September 2nd, 1948. Orders were made by this Court and the United States District Court for the Northern District of California pursuant to the "national emergency" provisions of the Labor Management Relations Act of 1947. Separate actions were filed on behalf of the United States against various maritime unions and ship operators, including Isbrandtsen and American-Hawaiian.[21] During this period collective bargaining negotiations looking to a settlement of the dispute were in progress. As a result of [12] these negotiations those connected with the maritime industry[22] were optimistic that the disputes would be satisfactorily settled before the

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[20] 29 U. S. C. A. 141 *et seq.*

[21] Plaintiffs' Exhibits 9 and 10; Civil Action No. 46-299, Southern District of New York.

[22] Throughout this opinion reference will be made to the testimony of various witnesses. Listed below are their names and positions:

1. *John Hansen Dalton* testified that at the time of his examination (October 21st, 1952) he was associated with Tidemann & Dalton, Inc., successor to Hansen & Tidemann, Inc.; that in 1948 he was a steamship agent and Vice President and Secretary of Hansen & Tidemann; that he was associated with Hansen & Tidemann since its formation in 1936; that he had been in the maritime industry since 1931 in the ports of New Orleans, La., and Galveston, Texas, except for the period between 1941 and 1945. Throughout the transactions involved in this suit Hansen & Tidemann acted as the agents of the defendant Isbrandtsen.

2. *Frederick R. Becker, Jr.*, testified that he was secretary-treasurer of Farrell Shipping Company; that he had been associated with that company since 1932, including the year 1948; that the company's business is that of export freight broker and forwarding agents; and that since 1936 Farrell Shipping Company has represented Colorado Fuel and Iron Corp.

expiration of the eighty-day injunction period.[23] This same optimism was shared by New York and New Orleans freight forwarders who continued to do business as usual and to book freight for July, August and September sailings.[24] It was in such a setting that Colorado, acting through its New Orleans freight forwarder, Farrell Shipping Co., entered into the affreightment contract of July 29th, 1948,[25] with the defendant Isbrandtsen for the transportation of 1000 tons of caustic soda from New Orleans to Bombay, India, on the S.S. Jane G. Swisshelm or

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3. *Robert L. Gray* testified that he was Vice President and Operating Manager of the American-Hawaiian Steamship Company.

4. *Frank H. Bain* testified that he was Atlantic Marine Superintendent of the American-Hawaiian Steamship Company.

5. *Joseph H. Masse* testified that he was master of the S. S. HAWAIIAN in August, 1948.

6. *Charles A. Kacocha* testified that he was master of the S. S. HAWAIIAN prior to August, 1948, and after the 8th or 9th of December, 1948.

7. *Ward Wire* testified that he was General Traffic Manager of Colorado.

8. *Siguard E. Simpson* testified that in September, 1948, he was Chief Clerk of Hansen & Tidemann and personally handled a large number of matters which related to the caustic soda in question.

9. *Charles J. Conlon* testified that he is a freight forwarder doing business under the name of Shippers Export Service Company in New York City, and that he had been in the freight forwarding business since 1928.

10. *Matthew S. Crinkley* testified that he was Executive Vice President of the Isbrandtsen Company, Inc.; that he had been with that organization for the twenty-five years last past; and that the matter in suit came under his over-all supervision.

11. *Robert T. Smith* testified that he was President of the Standard Stevedoring Company; that from January 1st, 1947, until September 17th, 1951, he was Vice President and General Manager of the New Orleans Stevedoring Company; and that he had been in the maritime industry thirty-eight years, the last fifteen of which being in New Orleans.

12. *Louis B. Morgan* testified that he was at the time of his deposition (November 3rd, 1954) the General Export Sales Manager of Colorado Fuel and Iron Corp., and that in 1948 he was second in command of the export department of that corporation.

[23] Testimony of Gray, S. M. P. 410-411; testimony of Bain, S. M. P. 428.

[24] Testimony of Conlon, S. M. P. 127, 145-146, 149, 156; testimony of Becker, S. M. P. 234-235.

[25] Plaintiffs' Exhibit 4 (Dalton deposition), Defendants' Exhibit B; S. M. P. 217.

other A-1 vessel, the scheduled sailing date of which was August 28th-30th, 1948, with shipside delivery required between August 19th-25th, 1948.[26] Conlon, a New York freight forwarder, testified that to arrange for a shipment of cargo of this size required a considerable period of intervening time.[27] Both he and Becker testified that it was very difficult to book freight space for a shipment of caustic soda because of the reluctance of shipping companies to handle a material possessing its physical characteristics.[28] [13] Becker said he met with this difficulty when he unsuccessfully tried to book the cargo with the Isthmian Steamship Company and other lines serving Bombay and that defendant Isbrandtsen was found to be the only carrier willing or able to undertake the shipment.[29]

On August 17th, 1948 and pursuant to a right reserved to it under the contract of affreightment[30] defendant Isbrandtsen through its agents, Hansen & Tidemann, notified Farrell Shipping Co., and the latter in turn notified Colorado, that the S.S. Hawaiian which concededly was an A-1 vessel, had been substituted for the S.S. Jane G. Swisshelm, with latest shipside delivery at New Orleans by September 2nd, 1948.[31] Upon the receipt of this advice, Colorado requested Farrell Shipping to increase the tonnage covered by the affreightment contract from 1000 to 1500 tons and, on August 19th, 1948 the lat-

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[26] See Defendant Colorado's Exhibit A.

[27] S. M. P. 143.

[28] S. M. P. 140, 146-147, 216; Plaintiffs' Exhibit 4 (Becker deposition), page 176. The difficulty in obtaining a ship to carry caustic soda is that this commodity eats away at its own container and the things around it, if permitted to do so, and it therefore cannot be stored with many other products when shipped (Plaintiffs' Exhibit 4 [Becker deposition], p. 223).

[29] Plaintiffs' Exhibit 4 (Becker deposition), pages 176, 179-180; Defendant Colorado's Exhibit A; S. M. P. 235-236.

[30] Plaintiffs' Exhibit 4 (Dalton deposition), Defendants' Exhibit B.

[31] Plaintiffs' Exhibit 4 (Becker deposition), page 194; S. M. P. 218.

ter did so by oral arrangement with Hansen & Tidemann, confirming such additional booking to its principal.[32]

Concerning the substitution of the S.S. Hawaiian, Becker testified that while he had been [14] advised by Hansen & Tidemann at the time of the original booking that the S.S. Jane G. Swisshelm was under bareboat charter to Isbrandtsen, he was not advised of the type of charter covering the substituted vessel and made no inquiry of Hansen & Tidemann with respect thereto as it was neither the custom nor the practice in New Orleans to do so.[33] Becker also testified that, prior to September 3rd, 1948, he did not know that the S.S. Hawaiian was owned by American-Hawaiian or that she was manned by a West Coast crew,[34] and that these were matters of no concern to him for the reason that his business dealings were with Isbrandtsen upon whom he relied and whom he felt to be a reliable company.[35] Ward Wire similarly testified that, prior to September 7th, 1948, he knew nothing about the crew or the charter of the Hawaiian.[36]

Having procured a firm commitment for the transportation of 1500 tons of caustic soda to Bombay, Colorado, between August 20th and 27th, 1948, proceeded to ship a total of 1490 tons by railroad from its plant at Ladora, Colorado, to New Orleans.[37] Meanwhile [15] on August 30th, 1948, the S.S. Hawaiian arrived at the Port of New Orleans from Houston, Texas, and, after bunkering, docked at Westwego Wharf No. 3 shortly after twelve noon on August 31st, 1948.[38] At one P. M. on the same day, loading of the caustic soda aboard the Hawaiian was

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[32] Plaintiffs' Exhibit 4 (Becker deposition), pages 189, 195; S. M. P. 221.

[33] S. M. P. 217-219, 280.

[34] S. M. P. 224, 257.

[35] S. M. P. 252, 257-258.

[36] S. M. P. 297.

[37] Plaintiffs' Exhibit 4 (Becker deposition), page 186; S. M. P. 293.

[38] Plaintiffs' Exhibit 4 (Becker deposition); Defendants' Exhibit J.

commenced by stevedores employed by Isbrandtsen, and was continued on September 1st and 2nd, 1948, on which latter date loading of the caustic soda was completed with the loading of 4799 drums containing a total of 1491.42 gross tons.[39]

It appears from the Mate's Daily Reports[40] that all of the caustic soda accounted for on the bills of lading was loaded into the Hawaiian prior to the strike. All of the witnesses testified to this effect excepting Captain Kacocha who thought that some of the caustic soda might have been loaded into the upper 'tween deck after the strike was over, but he had no recollection one way or the other.[41] Simpson, an eyewitness, testified that he left Hansen & Tidemann's office for Westwego at ten A. M. on September 3rd; that it took him about forty-five [16] minutes to get there; that when he arrived he saw no work going on; that he did see trucks on the dock but did not see any caustic soda.[42] I find that all caustic soda was in fact loaded aboard the Hawaiian prior to the strike. The stowage plan[43] indicates that caustic soda was to be loaded into lower holds 1, 2, 3 and 4 and some into the upper 'tween deck, and that automobiles destined for Basra were to be stowed above the caustic soda. Simpson testified that the caustic soda was placed in the lower holds because it was heavy cargo and because Bombay succeeded Basra on the Hawaiian's list of ports of call.[44] It was therefore planned that the autos would be unloaded at Basra without having to move the caustic

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[39] Plaintiffs' Exhibit 3 (Masse deposition); Plaintiffs' Exhibit 2 (Mate's Daily Reports); Plaintiffs' Exhibit 4 (Dalton deposition); Plaintiffs' Exhibit 2 (Stowage Plan); Plaintiffs' Exhibit 18 (Smooth Deck Log). The stowage plan was prepared after the HAWAIIAN was loaded. Plaintiffs' Exhibit 4 (Dalton deposition), page 80.

[40] Plaintiffs' Exhibit 4 (Dalton deposition); Plaintiffs' Exhibit 1.

[41] Plaintiffs' Exhibit 5, pages 8, 28.

[42] S. M. P. 388-389.

[43] Plaintiffs' Exhibit 4 (Dalton deposition); Plaintiffs' Exhibit 2.

[44] S. M. P. 369-370.

soda. It is noted in the smooth deck log[45] that at six P. M. on September 2nd, 1948 "three (3) nite gangs resume loading #2, 4 and 5 hatches, loading 'Basra' cases, chassis in all lower holds;" that at 10:30 P.M. on the same day #2 lower hold (containing caustic soda, with autos on top of the caustic soda) was finished and that the stevedores started loading Basra cargo in #2 lower 'tween deck; that all stevedore gangs knocked off [17] for supper at midnight and that at one A. M. "four (4) gangs resume loading 'Basra' in #1, 2, 4, 5 hatches." Simpson corroborated this by testifying that automobiles were being loaded on the night of September 2nd-3rd, and that the caustic soda had been loaded into those holds prior to that time.[46] Smith also corroborated this by testifying that all of the caustic soda was aboard the Hawaiian when the strike was called.[47] The loading certificates of the New York Board of Underwriters state that all of the caustic soda was carried below deck.[48] I find that all of the caustic soda was loaded aboard the Hawaiian by six P. M. on September 2nd, 1948.

The smooth deck log of the Hawaiian[49] shows that at three P. M. on September 2nd the stewards department left the ship to attend a union meeting and not return to the ship until three A. M. on September 3rd, when they returned to remove their personal effects. At 3:15 A. M. On September 3rd, 1948, the stewards of the ship went ashore and were "definitely on strike."[50] The loading of the cargo continued throughout the remainder of

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[45] Plaintiffs' Exhibit 18.

[46] S. M. P. 371.

[47] Plaintiffs' Exhibit 4 (Smith deposition), page 142.

[48] Defendant Isbrandtsen's Exhibits 1 and 4.

[49] Plaintiffs' Exhibit 18.

[50] See *supra*, Footnote 49.

that [18] night and until ten A. M. in the morning.[51] The engine room crew ceased working at that time, struck the vessel and refused to supply the steam necessary to drive the ship's winches so that cargo should be loaded.[52]

Plaintiffs have claimed that the caustic soda was loaded aboard the Hawaiian when it was in an unseaworthy condition: more particularly, that the Hawaiian was unseaworthy as it was without a proper crew. This claim is without foundation. Though the stewards left the ship prior to the completion of loading the caustic soda (by three hours) their services were unnecessary for the loading operation. Even if it be said that a strike by depriving a vessel of its crew renders the vessel unseaworthy there was no deprivation of crew until ten A. M. on September 3rd, some sixteen hours after all of the caustic soda was loaded. And even if it further be said that the deprivation of stewards aboard a merchant vessel renders it without a crew and in turn breaches the warranty of seaworthiness the facts demonstrate that the stewards did not [19] strike until 3:15 on the morning of September 3rd. When the stewards left the Hawaiian on September 3rd it was to attend a union meeting and whether or not they would strike was not known until the following morning after all of the caustic soda had been loaded aboard.

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[51] Captain Kacocha, who commanded the HAWAIIAN on the voyage prior to the one in issue and who rejoined the HAWAIIAN as master in December, 1948, testified that the Pacific Coast labor disturbance gave every indication of being settled, and that strike talk was a frequent conversation piece in the industry, but that on the voyage prior to the one on which the strike occurred neither ship's delegates nor union delegates talked with him with respect to their labor agreements. Plaintiffs' Exhibit 5, pages 5 and 39. Captain Masse, who was master of the HAWAIIAN during the interval Captain Kavocha was ashore, testified that he had no knowledge of an impending strike and that it "was a surprise to most everybody," and that the first notice he had that any of the crew would walk off the vessel was at three A. M. on September 3rd, when the stewards struck. Plaintiffs' Exhibit 4, pages 12, 28-29.

[52] The crew of the HAWAIIAN belonged to West Coast unions so that although agreement had been reached by East and Gulf Coast unions and ship operators it did not affect the crew of the HAWAIIAN, even though the ship was docked in a Gulf port.

Not knowing or being advised of the work stoppage of the ship's stewards, Farrell Shipping Company at 9:30 A. M. on September 3rd, delivered to Hansen & Tidemann Colorado's check in prepayment of the ocean freight charges in the amount of $32,848.72, and a runner for Farrell Shipping received, as had theretofore been requested, the two on board ocean bills of lading covering the shipment, which is thereupon forwarded to Colorado.[53]

Becker testified that he first learned of the strike of the crew of the Hawaiian in the early afternoon of September 3rd, but did not inform Colorado of it until September 7th, because "the situation was very unclear on September 3rd * * * It was a temporary situation and we were trying to see how it would progress, and then * * * there was a long weekend occasioned by the Labor Day holiday."[54] [20] Becker also testified that on or about August 18th, 1948, he learned that the maritime labor disputes involving the East and Gulf Coasts had been settled and that he had formed the opinion "there would be no trouble at New Orleans, there would be no strike there."[55] He further testified that, prior to the strike, he did not know to what unions the officers and crew of the Hawaiian belonged,[56] that no one told him that a strike was to be declared by the crew aboard the ship,[57] and that Farrell Shipping continued to book space right along for delivery to ships after September 1st, 1948.[58] Becker further said that he was dealing with Isbrandtsen and their agents and in August, 1948, did not know who owned the Hawaiian.[59]

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[53] Testimony of Becker, S. M. P. 223-225, 248-249; testimony of Simpson, S. M. P. 350-351, 385-386, 391; Plaintiffs' Exhibit 4 (Becker deposition); Defendants' Exhibit I. (That this latter exhibit is dated September 1st, 1948, is explained by Becker at pp. 211-212 of Plaintiffs' Exhibit 4.)

[54] S. M. P. 261-262; Defendant Colorado's Exhibit C.

[55] S. M. P. 229.

[56] S. M. P. 234.

[57] S. M. P. 234.

Ward Wire testified that the first he heard about a strike involving the Hawaiian was late September 7th or September 8th, when he received Becker's telegram advising that the vessel had been "delayed by strike of West Coast crew."[60] Word of the strike came as something of a surprise to Colorado's traffic department. K. B. Griffith, Colorado's Assistant Traffic Manager, wrote to [21] Farrell Shipping Company on September 10th:

"* * * * * *

"As a matter of curiosity I am unable to understand why this vessel is being picketed and will appreciate your enlightening me on the subject."[61]

Griffith was advised by Farrell Shipping on September 13th[62] that the strike was due to Isbrandtsen's chartering the Hawaiian from a West Coast line and that the vessel was manned by a crew belonging to a West Coast union who struck the vessel when a strike of their union commenced on the Pacific Coast. Louis B. Morgan testified that he had no knowledge of the strike aboard the Hawaiian prior to September 13th, and that no information concerning the strike appears in the files prior to that date.[63]. Colorado's New York export office by letter of September 20th, thereupon notified the plaintiffs of the delay in sailing the Hawaiian.[64] It wasn't until January 8th, 1949, after the dispatch of other communications in connection with the caustic soda,[65] that the plaintiffs protested the delay caused by the strike aboard the Hawaiian.[66]

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[59] S. M. P. 252-253, 257.

[60] S. M. P. 295; Defendant Colorado's Exhibit C.

[61] Defendant Colorado's Exhibit B.

[62] Defendant Colorado's Exhibit D.

[63] Plaintiffs' Exhibit 6.

[64] Plaintiffs' Exhibit 1, Schedule BC.

[65] Plaintiffs' Exhibit 1, Schedules BD, BE, BF and BB.

[66] Plaintiffs' Exhibit 1, Schedule BH.

[22] Plaintiffs claim that Colorado failed to notify them promptly of the fact that the Hawaiian was strike-bound. This claim is without substance. In light of the above chronology I find that plaintiffs were notified within a reasonable time after the strike and after the facts of an unclear situation could be had. It should also be noted that only two ships in the entire port of New Orleans were affected by the West Coast Strike, the Hawaiian being one of them.

Plaintiffs also claim that Colorado breached its duty to them by accepting the substitution of the Hawaiian for the Jane G. Swisshelm, since the expected sailing date of the Hawaiian was after the expiration of the eighty-day Taft-Hartley injunction whereas the sailing date of the Jane G. Swisshelm was before. Little merit lies in this contention since by the very terms of the letters of credit caused to be opened by the plaintiffs they were willing to accept shipment of the caustic soda by September 22nd for one part and October 10th for another.

Once the strike had been called it was not [23] possible either to sell the Hawaiian or to remove the caustic soda and forward it aboard some other vessel. Gray,[68] Crinkley,[69] Becker,[70] Dalton,[71] and Smith,[72] all testified that when the engine room gang struck the ship on September 3rd cargo could not be loaded or discharged by ship's tackle because there was no steam to operate the winches and equipment. The Hawaiian was regarded in the trade as a "hot ship."[73] Seamen and stevedores of non-striking unions would not work the vessel because in order to do

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[67] Plaintiffs' Exhibit 4 (Smith deposition), pages 121 and 160.

[68] S. M. P. 408-409.

[69] S. M. P. 328-330.

[70] S. M. P. 244.

[71] Plaintiffs' Exhibit 4, page 107.

[72] Plaintiffs' Exhibit 4, pages 146-148.

[73] Plaintiffs' Exhibit 4 (Gormley deposition), page 259.

so they would have had to cross picket lines and this it was well known in the trade they would refuse to do. Similarly for crane operators and others needed to unload the cargo. While the ship was on strike it was impossible to do anything with respect to loading, unloading or sailing her from port.

I hold that due and proper shipment was made when the caustic soda was loaded aboard the Hawaiian.

The contract called for the delivery of caustic soda CIF Bombay.[74] The caustic soda was fully loaded prior to the commencement of the strike. [24] In sales agreements the risk of loss follows the fictional "property right" to the goods.[75] In a CIF contract the "property" right passes to the buyer upon delivery to the carrier. Hence the property right to the caustic soda passed to the plaintiffs when the caustic soda was loaded aboard the S. S. Hawaiian, which was prior to the walkout, and the risk of loss also passed to the plaintiffs. (Plaintiffs do not claim that the documents were not actually presented.)

A court naturally hesitates to apply such concepts to a transaction where the parties are unaware of its legal significance. But here this was not the case. Early in the negotiations between the plaintiffs and Colorado there

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[74] The exchange of cables and correspondence which established the contract evidences a stated intent, if any, that a Gulf port, or more particularly New Orleans would be the point where the "property" in the caustic soda would pass from seller to buyer. New York Personal Property Law 99(1); *Cundill v. Millhauser Corp.*, 257 N. Y. 416, 178 N. E. 680 (1931); *Willits & Patterson v. Abekobei & Co., Limited*, 197 App. Div. 528, 189 N. Y. Supp. 525 (1st Dept. 1921); *Schapflocher v. Essgee Co. of China, Inc.*, 197 App. Div. 781, 189 N. Y. Supp. 498 (1st Dept. 1921); *cf. Warner, Barnes & Co., Limited, v. Warner Sugar Refining Co., et al.*, 117 Misc. 247, 192 N. Y. Supp. 151 (Sup. Ct. 1921), affd. *sub nom Warner-Barnes & Co., Ltd., v. Oriente Securities Co.*, 202 App. Div. 789, 194 N. Y. Supp. 987 (1st Dept. 1922). That this was a CIF transaction so merges with the conduct of the parties and the usages of the trade (New York Personal Property Law 99[2]) that it makes it incumbent upon this Court to examine further into this aspect of the contract to better determine the actual intent of the parties. *Cf. Dwane v. Weil, et al.*, 199 App. Div. 719, 192 N. Y. Supp. 393 (1st Dept. 1922), affd. 235 N. Y. 537, 130 N. E. 720 (1923).

[75] New York Personal Property Law 103.

was considerable trading over the price of the caustic soda and shipping arrangements. Colorado offered 4300 tons at nine cents per pound FAS Gulf Ports or 10.102 cents per pound CIF Bombay. The plaintiffs were willing to pay 9 1/2 cents per pound CIF Bombay. Colorado then wanted ten cents per pound CIF Bombay. The plaintiffs held fast to 9 1/2 cents per pound CIF Bombay and Colorado then met the plaintiffs' price, [25] CIF Bombay. These negotiations point to the fact that the plaintiffs were aware of the import of the terms like FAS and CIF.

The rationale of the rule that under a CIF contract "property" to the goods passes upon delivery to the carrier is that the cost of insurance and freight, in addition to the cost of the goods themselves is reflected in the contract price. Since then the buyer is really paying the cost of insurance and freight the "property" passes to him. Frequently buyers do not know they are bearing these charges and simply accept the price of-

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[76] *Mee, et al., v. McNider*, 109 N. Y. 500, 17 N. E. 424 (1888); *Warner, Barnes & Co., Limited, v. Warner Sugar Refining Co., et al., supra*, footnote 74; *Warner Bros. & Co., Limited, v. Israel*, 101 F. 2d 59 (2d Cir. 1939); cf. *Mora y Ledon, et al., v. Havemeyer, et al.*, 121 N. Y. 179, 24 N. E. 297 (1890); see *Seaver v. Lindsay Light Company*, 233 N. Y. 273, 276, 135 N. E. 329, 330 (1922), where the Court said:

> "The meaning of the letters c.i.f. in an executory contract is, and at the time the contract in question was made were, well understood in the commercial world. They mean the cost of the merchandise, insurance thereon, and freight charges to point of destination. (*Thames & Mersey Ins. Co., Ltd., v. U. S.*, 237 U. S. 19.) Unless there is something in a c.i.f. contract to indicate to the contrary, the seller completes his contract when he delivers the merchandise called for to the shipper, pays the freight thereon to point of destination, and forwards to the buyer bill of lading, invoice, insurance policy and receipt showing payment of freight. (*Mee v. McNider*, 109 N. Y. 500; *Smith Co., Ltd., v. Marano*, 267 Penn. St. 107; *Ireland v. Livingston*, L. R. 5 H. L. 395; *Klipstein v. Dilsizian*, 273 Fed. Rep. 473; Williston on Sales, Secs. 407, 408; Mechem on Sales, Vol. 2, Sec. 1736.)"

See also *Smith Co., Limited, v. Moscahlades, et al.*, 193 App. Div. 781, 183 N. Y. Supp. 500, 503 (1st Dept. 1920); *Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. 2d 399, 402 (2d Cir. 1945), cert. denied 325 U. S. 861 (1945).

fered. In such circumstances, the rule would have little support in reason. In the case at bar the plaintiffs realized they were paying for the freight and insurance; without trading, they could have had the caustic soda at nine cents per pound, arranging for paying directly for the freight and insurance themselves. They appear no novices to commercial transaction, and understood the accepted commercial meaning of terms like FAS and CIF. They chose to pay the additional 1/2 cent per pound, i. e., nine and 1/2 [26] cents per pound flat for everything, goods, freight and insurance. There would be no point to insuring the caustic soda while aboard the vessel unless the plaintiffs had an interest in the caustic soda. Since they were the owners at that time, as between Colorado and themselves, the loss occasioned by the strike should properly be borne by them. I find that the parties to this contract intended that the terms CIF be given their normal and accepted commercial effect."[7]

Though our decision could rest there, another important ground is present. With respect to the second ground the issue is: As between the plaintiffs and Colorado under the terms of their contract who should bear the burden of the loss caused by a strike for which, admittedly, neither the plaintiffs nor Colorado was responsible. No undue delay is charged as to Colorado's actions before the walkout nor after its cessation. The only delay of consequence was due to the prolonged strike. I would hold that the seller-shipper is properly relieved of any loss plaintiffs were occasioned by this shipping strike.

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[7] For the purposes of clarity, perhaps it should be stated that in the circumstances presented in this case the fictional "property" right in the caustic soda passed at the same time that the parties intended responsibility for the goods to pass from seller to buyer, namely upon the seller's delivery of the caustic soda to the carrier. In effect, then, no legal fiction is being applied.

[27] Maritime strikes, authorized and unauthorized, occur quite frequently. They vary considerably in duration, from hours to weeks to months as did the strike considered at bar. The certainty of occurrence or duration of a strike is impossible to foretell. Most disputes are resolved without a strike. Most strikes are of brief duration. The results of negotiations cannot be foreseen. Shippers frequently do not know how long a strike is going to last when one is impending or confronting them.[78] If this walkout had lasted a few days or a week there would be no lawsuit here. The strike might have been settled before the strike deadline; it might have been postponed pending the outcome of further negotiations; when it occurred the force of it might have brought the contesting parties to a speedy resolution of their differences. To say otherwise would mean that shippers when aware that there might be a strike would have to forego all business until the situation became crystal clear. In the face of the many contingencies to hamstring sellers and shippers from proceeding to load and dispatch because of local and national waterfront and shipping labor [28] disturbances would virtually stymie foreign commerce.

At times it can be said that the parties to a contract can allocate the risk of strike as between themselves by making provision therefor in their contract, and in the absence of such a provision the loss better falls upon the shipper-seller as one of the risks incident to his business. This, some contend, is better than to saddle the occasional customer with the loss. Such reasoning is more applicable to strikes affecting the seller's plant or place of business which might be avoided by his own act, i. e., acquiescing in the employees' demands. Here, Colorado had no control at all over the striking crewmen. More important, contracting specifically to cover

[78] See S. M. P. 156, 273.

liability due to strike, though to be encouraged, frequently does not enter negotiations which are made with speed and haste, and which involve a speculative element, as did this one.[79] Rather than mechanically apply any fixed rule of law, where the parties themselves have not allocated responsibility, justice is better served by appraising all of the circumstances, [29] the part the various parties played, and thereon determining liability. This may well serve to explain any apparent division of authority in this area of the law.[80] We do not mean to hold, nor do we, that if, in the face of an impending labor disturbance affecting a shipment under contract, a seller ships having good reason to know that the shipment will not meet the dates contracted for he would be absolved of liability for damages. But here we have no such evidence. Though fraud was pleaded in the complaint, it was not pleaded with the particularity required by the Rules.[81] Ignoring this technical defect, there has been no proof of fraud at all in this case. I hold that Colorado and its agents, Farrell Shipping Company, acted in good faith and under the circumstances exercised reasonable business prudence.

The seller in such a situation is presented with another dilemma. If he fails to load a vessel in the face of an impending strike and the strike never materializes or is quickly terminated he may well be found in litigation defending his judgment against buyers who have suffered damage [30] because of the delay in booking the cargo elsewhere, or defending against carriers for breach of contracts of affreightment and demurrage.[82]

For us to require sellers to know with foresight how long a strike will last and to stop their commercial oper-

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[79] Plaintiffs' Exhibit 2 (Badhwar deposition), page 100.

[80] See 6 Williston on Contracts 1951A (1938).

[81] Fed. R. Civ. P. 9(b).

[82] See S. M. P. 274.

ations until the shipping picture is completely clear is just too much tightrope walking to require of anyone. Where there is a strike, delay caused thereby, and loss caused by the delay, the loss suffered by a party to a commercial contract is better borne by him upon whom it falls, absent, of course, malfeasance by any of the interested parties.

We turn now to the claims against Isbrandtsen and American-Hawaiian. As far as the plaintiffs or Colorado were concerned they were dealing with Isbrandtsen. Isbrandtsen had time chartered the vessel from American-Hawaiian.[83] If liability exists as to the defendant Isbrandtsen, American-Hawaiian might be liable to Isbrandtsen, which would, of course, be determined by the terms of the charter party. We will first deal with the actions of [31] Isbrandtsen and their agents making reference to American-Hawaiian where necessary, and then to the liability of American-Hawaiian, if any exists.

I find no liability on the part of Isbrandtsen for any losses which may have been sustained by the plaintiffs. Isbrandtsen was bound to deliver the bills of lading to the shipper, upon his demand, after receiving the caustic soda into its charge, i. e., as soon as this cargo was loaded aboard the S.S. Hawaiian. Becker testified that he asked for the bills of lading[84] and his testimony is corroborated by Simpson who said that someone in the office of Farrell Shipping phoned on September 2nd to determine when they could be expected to pick up the bills of lading.[85] Both witnesses testified that this was the normal practice in the industry.[86] I have found that all of the caustic soda was loaded aboard the Hawaiian by six P. M. on September 2nd, 1948, 15 1/2 hours before Simp-

[83] Plaintiffs' Exhibit 3 (Masse deposition); Defendant American-Hawaiian's Exhibit 1.

[84] S. M. P. 248.

[85] S. M. P. 351.

[86] S. M. P. 248, 351.

son delivered the bills of lading to a runner from Farrell Shipping.[87] Therefore Isbrandtsen through its agents Hansen & Tidemann made proper delivery of the bills of lading to [32] Farrell Shipping Company, as it was required by law to do.[88]

In addition, under the terms of the United States Carriage of Goods by Sea Act the carrier is expressly exempted from responsibility for loss or damage arising or resulting from "strikes or lockouts or stoppage of restraint of labor from whatever cause, whether partial or general; * * *"[89] The United States Carriage of Goods by Sea Act was expressly incorporated into the bills of lading in paragraph 1 thereof.[90]

It is appropriate at this point to consider plaintiffs' claim that defendants were in an unholy hurry to load their caustic soda aboard the Hawaiian. With this contention plaintiffs seek to persuade the Court that Colorado was remiss in its duties (whether they sound in tort or contract is not here important) seeking to load only so it could get the bills of lading and be able to collect under the letters of credit, and that Isbrandtsen was negligent, if not reckless, seeking to load only so it could collect the freight charges, and that thus Isbrandtsen is deprived of the exoneration provided [33] by the United

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[87] S. M. P. 350-351.

[88] United States Carriage of Goods by Sea Act 3(3); 46 U. S. C. A. 1303(3). This section provides:

"(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading * * *"

[89] 4(2)(j); 46 U. S. C. A. 1304(2)(j). This section provides in full:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * * * *

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;"

[90] Plaintiffs' Exhibit 4 (Dalton deposition); Defendants' Exhibits F and H.

States Carriage of Goods by Sea Act 4(2)(j)[91] and is otherwise liable. As to Colorado there is no evidence that its agent, Farrell Shipping Company, had anything to do with the loading of the Hawaiian. That was Isbrandtsen's job, and we will deal with this phase of the case only in terms of the actions of Isbrandtsen and their agents.[92]

The principal evidence upon which the plaintiffs rely to support their contention surrounds the fact that the stevedores in loading the Hawaiian at New Orleans worked overtime.[92] Matthew Crinkley testified that Isbrandtsen hired the stevedores (New Orleans Stevedoring Company, Inc.) by contract and arranged for their services, but that it was the duty of Hansen & Tidemann to give the necessary cooperation and supervision to the

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[91] 46 U. S. C. A. 1304(2)(j). The proviso in this section (see footnote 89, *supra*) must refer to acts of the carrier for which in law the carrier can be attributed with some measure of fault. If any act of the carrier deprived it of the protection of the statute the section would be without meaning.

[92] The HAWAIIAN arrived in New Orleans at 11:06 A. M. on August 30th, 1948. Shortly thereafter the bar pilot boarded the vessel. At 1:34 P. M. the river pilot boarded and directed the ship up the Mississippi River. At 8:17 P. M. the HAWAIIAN docked at the Standard Oil Chalmette dock and proceeded to bunker at 10:35 P. M. After bunkering the HAWAIIAN went to Westwego Wharf No. 3 arriving around noon on the 31st of August. At 1 P. M. loading of the vessel commenced. On Friday, September 3rd, at ten in the morning loading ceased because of the strike, and the vessel was declared off hire, whereupon it was released to the Strachan Shipping Company on orders of the American-Hawaiian Steamship Company. It returned to the Westwego Wharf at 8:30 P. M. on December 9th, 1948, and loading was resumed at 8 A. M. on December 13th when the HAWAIIAN got its steam up (Plaintiffs' Exhibit 18; Plaintiffs' Exhibit 4 [Smith deposition], p. 159). The plaintiffs do not claim deviation nor do they claim that once the vessel left New Orleans after the strike had ended it did not prosecute that voyage promptly and diligently (S. M. P. 181-184). The vessel arrived in Bombay on February 25th, 1949, and commenced discharging cargo when it got into a wharf on February 28th, 1949. Some delay in getting into the wharf was experienced due to the congestion of the harbor (Plaintiffs' Exhibit 5 [Kacocha deposition], pp. 18-19). All the cargo consigned to the plaintiffs was discharged by the HAWAIIAN into the custody of the Bombay Port Trust on or before March 12th, 1949 (Plaintiffs' Exhibit 5 [Kacocha deposition], p. 20). All the cargo composing this shipment was received by the plaintiffs from the Bombay Port Trust on or before March 17th, 1949 (Plaintiffs' Exhibit 2 [Badhwar deposition]; Defendant Isbrandtsen's Exhibit C).

stevedoring that was done on Isbrandtsen's behalf.[93] The record is not entirely clear as to who ordered the overtime here considered, but it was either Isbrandtsen or their agents, Hansen & Tidemann.[94] In the course of loading the Hawaiian the stevedores worked some eighteen hours overtime, of which only three hours were worked during the period the caustic [34] soda was being loaded.[95] According to Dalton's testimony overtime was worked by the stevedores on the Hawaiian during the following hours: (A) Wednesday, September 1st, 1948—from 5 P. M. until 6 P. M. (B) Thursday, September 2nd, 1948—from 7 A. M. until 8 A. M.; from 5 P. M. until 6 P. M.; and from either 6 P. M. or 7 P. M.[96] until midnight. (C) Friday, September 3rd, 1948—from 1 A. M. until 10 A. M.

Plaintiffs further point to a letter dated September 2nd, 1948 from Robert T. Smith, Vice President and General Manager of the New Orleans Stevedoring Company to Dalton.[97] This letter is set out in full:

"Re: SS 'Hawaiian'

"Dear Mr. Dalton:

"This will confirm our telephone conversation of yesterday wherein we advised you that there is a possibility of being able to sail this vessel from New Orleans Saturday afternoon, weather permitting, at an overtime cost of approximately $1000.00 to $1500.00.

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[93] S. M. P. 327-328.

[94] See Plaintiffs' Exhibit 4 (Dalton deposition), pages 30-31.

[95] Plaintiffs' Exhibit 4 (Dalton deposition), page 32.

[96] According to the HAWAIIAN's smooth deck log (Plaintiffs' Exhibit 18) for September 2nd, 1948, the four-day gangs of stevedores knocked off for supper at 6 P. M. and at the same hour three night gangs commenced loading. Overtime was therefore worked on that date from 6 P. M., and not 7 P. M., until midnight.

[97] Plaintiffs' Exhibit 4 (Dalton deposition); Plaintiffs' Exhibit 3.

[35] "In giving you this estimate please bear in mind the difficulty we are encountering in loading the vessel. Due to her construction the parcels of boxed automobiles and the hogsheads of tobacco are confronting us with a serious stowage problem and we could possibly encounter unexpected delays in stowing the large boxes of automobiles and trucks and the progress we will make when we start loading them cannot be determined at this time.

"We are now chiefly concerned with getting all the cargo on board and in order to do so we cannot concern ourselves too much with despatch even though it could possibly mean a financial loss to ourselves as we understand the gravity of the situation should any cargo be shut out."

Taking this document at its face, it seems that Dalton and Smith had a telephone conversation on September 1st with respect to what it would cost to work the Hawaiian overtime. Smith advised Dalton of the cost and confirmed his advices on the day following with this letter. The major [36] part of the overtime worked was from six P. M. on September 2nd until the crew of the Hawaiian refused to supply steam at ten A. M. on the morning of September 3rd.[98] At 1:07 P. M. on September 2nd, a telegram addressed to Hansen & Tidemann for Captain Masse was received in the New Orleans office of Western Union.[99] This telegram was delivered to Hansen & Tidemann and in the regular course of business copies were typed and the original telegram and

[98] It was Smith's testimony that his letter of September 2nd was written in good faith and expressed his honest view in voicing the hope that the HAWAIIAN could leave New Orleans on September 3rd, and that overtime is a quite normal occurrence in the shipping industry (Plaintiffs' Exhibit 4 [Smith deposition], p. 158).

[99] Plaintiffs' Exhibit 4 (Dalton deposition); Plaintiffs' Exhibit 4.

either two or three copies were given to Captain Masse.[100] It was never elicited from Dalton whether or not he had any personal knowledge of that telegram. In any event some one or more of his employees had knowledge of it, and that knowledge is chargeable to him.[101] Taking these facts from the vantage point most favorable to the plaintiffs we have this picture: Hansen & Tidemann, fully conscious that the eighty-day injunction period was ending on September 2nd, 1948, were exceedingly anxious to have the Hawaiian loaded as quickly as possible. They had knowledge sometime in the afternoon of the 2nd that a strike was imminent if only by virtue of Gray's telegram to Masse instructing Masse as to the procedure [37] to follow if a strike was not averted.[102] In an effort to get the ship to sea before a strike was called they ordered the Hawaiian to be worked through the night of September 2nd in order to beat the strike deadline.[103] The question thus presented with the evidence so viewed is whether this was the exercise of due diligence and sound business judgment or whether it was negligence or recklessness so as to remove from the carrier the cloak of immunity with which 4(a)(j) of the United States Carriage of Goods by Sea Act enshrouds it. I hold that even if the

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[100] Plaintiffs' Exhibit 4 (Dalton deposition), page 50.

[101] Simpson testified that he arrived at the office of Hansen & Tidemann at eight A. M. on September 3rd, issued the bills of lading at 9:30 A. M., and saw Gray's telegram to Masse. The question was never put to him as to whether he saw the telegram prior to or after delivering the bills of lading to Farrell Shipping's runner.

[102] It was Gray's testimony that up to the time of the strike he and American-Hawaiian were hopeful that a strike could be averted; that during the period the injunction was in force American-Hawaiian operated on the theory that there would be no strike; that on September 2nd the unions and ship operators had a meeting to resolve their differences; that at that time there was agreement on some things; that negotiations had been going on for some time and continued after the strike was declared; that a Mr. Plant, Vice President of Operations of American-Hawaiian, told him on September 2nd that the labor situation didn't look too good; and that the telegram was sent to Captain Masse in the event a strike did occur, but that he had no actual knowledge that there would be a strike (S. M. P. 415 *et seq.*).

[103] See Plaintiffs' Exhibit 4 (Smith deposition), page 154.

evidence were so viewed loading the Hawaiian in the manner in which it was loaded was not reckless or negligent conduct. As with the shipper it is too much to require of the carrier that it wait until a strike situation becomes crystal clear before loading a vessel. Customers want their goods. Hindsight now reveals to us that this strike lasted quite a long time, [104] and it was, furthermore, a reasonable estimate of the situation to believe that the vessel could be loaded before the crew stopped supplying the steam.[105] (Two observations should be noted: [1] Plaintiffs would have us believe that all Hansen & Tidemann [38] sought to accomplish was to have the caustic soda loaded before the expiration of the injunction period, thereby enabling themselves to collect the freight charges and enabling Colorado to collect under the bills of lading in the event a strike did occur. Plaintiffs have not introduced any proof whatsoever of such devious conduct, or that any anxiety on the part of Hansen & Tidemann to load the vessel was solely for the purpose of collecting with respect to the caustic soda. Most favorably viewed, the proof points only to an anxiety to load all of the New Orleans cargo aboard the Hawaiian and get it out of port as quickly as possible or to go to sea before a strike leaving some cargo destined for the Hawaiian on the wharf.[106] [2] The other observation is that although the injunction ended September 2nd, on September 1st Dalton and Smith were talking in terms of getting the Hawaiian to sail by Saturday, September 3rd. This would indicate that overtime was being considered and was finally utilized for reasons other than beating the strike deadline, e.g., to save on the ship's operating expenses.[107])

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[104] Plaintiffs' Exhibit 4 (Smith deposition), page 155.

[105] See Plaintiffs' Exhibit 4 (Smith deposition), page 170.

[106] Captain Masse testified that the HAWAIIAN was about two-thirds loaded when the engine room gang struck. Plaintiffs' Exhibit 3, page 13.

[107] See Plaintiffs' Exhibit 4 (Dalton deposition), page 105; Plaintiffs' Exhibit 5 (Kacocha deposition), page 57.

[39] However, with the evidence in its proper posture, Hansen & Tidemann on the afternoon of September 2nd are confronted by a dilemma. The Hawaiian is in the process of being loaded. The stewards have gone off to a union meeting; the Taft-Hartley injunction ends at midnight and the West Coast unions and ship operators have not yet reached agreement; Gray's telegram to Masse is received instructing him on what to do if a strike occurs; the vessel is about one-third loaded. Things don't look any too good. Should loading be stopped (and perhaps unloading commence) or should the Hawaiian be worked around the clock in an endeavor to beat the actual strike? If the loading is stopped the caustic soda will be aboard when the strike is declared, if one is declared. It may be of short or long duration, but during that period it will be impossible to remove the caustic soda. The consignee may or may not get his cargo when he needs it. If the decision is to start unloading there will be considerable difficulty booking the caustic soda on another ship. It is a touchy commodity, and another ship may or may not be had in [40] time. If the loading is rushed the Hawaiian may be able to get to sea before the strike, if there is one. The ship should be completely loaded some time during the night of Septemper 3rd-4th. The stewards haven't really struck; they're just talking about it in the union hall. If the caustic soda is to stay aboard because of difficulty in getting another ship it might be worth the effort to try to get the Hawaiian to sea. The East and Gulf Coast unions and ship operators have agreed to terms and maybe the West Coast unions and operators will do likewise within a short time. The unions may not strike even after the expiration of the injunction because agreement may be near, and if they do strike it may not be for a long time. What as a reasonable businessman showing proper regard for the rights of consignees should

be done? There is not much time, quick thinking is called for, and a decision must be reached. This Court cannot say that to continue with the loading as fast as possible in an attempt to get the Hawaiian to sea before a strike demonstrates the absence of due care. Hindsight provides a better view than foresight. But as the facts were, to proceed with loading with all possible dispatch was a reasonable decision.

[41] This view of the situation applies all the more to the actions of Captain Masse, master of the Hawaiian, when hours later he was confronted with the strike of the stewards at 3:15 A. M., on September 3rd. His decision not to stop the charterer from loading was proper under the circumstances.

For the law to demand that a carrier halt operations to await the outcome of imponderables, or to prescribe that only regular time be worked when a strike is threatened is to substitute a judge's business judgment for that of a businessman expert in the industry. The ordering of overtime was done in good faith, to get the Hawaiian loaded and to sea before any walkout occurred. The decision was a reasonable one under the circumstances and might have succeeded. A day or two before the crew struck it was reasonable to believe that the Hawaiian would either be able to get to sea before the crew struck or that if a strike was not averted before the vessel was fully loaded the strike would not be of the very long duration we now know it was. That this view of the matter did not prove to be successful makes it no more [42] imprudent seven years after the event than it was at the time, and certainly does not turn that conduct into a legal claim. And where only three hours of overtime were spent in the loading of plaintiffs' cargo, the force of their contention loses much of its vitality.[108]

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[108] See *The Maui*, 113 F. 2d 1018, 140 A. M. C. 1299 (9th Cir. 1940), *cert. denied* 311 U. S. 709 (1940); *The Toronto*, 174 Fed. 632 (2d Cir. 1909); 4 Williston on Contracts 1095 (1936).

Neither do we think that Isbrandtsen or its agents, Hansen & Tiedemann, were remiss in their legal obligations in delivering the bills of lading for the caustic soda to Farrell Shipping Company after the Hawaiian's stewards went on strike. Simpson gave the bills of lading to Farrell Shipping's runner at 9:30 A. M. on September 3rd, the engine room crew stopped supplying steam at ten A. M., thereby preventing any further loading, but the ship's stewards department were ashore "and definitely on strike" at 3:15 A. M.[109] Neither Becker nor Simpson knew anything of the strike aboard the Hawaiian until the crew stopped providing steam. Was Hansen & Tidemann required to withhold issuing the bills of lading once there was any sort of strike aboard the Hawaiian, whether they actually knew of it or not? We think not. The carrier [43] was required to issue the onboard bills of lading once the caustic soda had been stowed in its holds. The only option it enjoyed in the face of the impending strike was to refuse to load at all. Once it did load it was required to issue the bills of lading.[110]

As to American-Hawaiian it had no knowledge of the sale of the caustic soda nor any interest in the letters of credit or the proceeds thereof. It had no knowledge or interest in the negotiations between the shipper and Isbrandtsen nor in the arrangements between the two for the transportation of the goods. The booking agreement and delivery orders were signed by agents for the charterer, and Farrell Shipping, the forwarder and agent for Colorado. The bills of lading according to the testimony were prepared by Farrell Shipping Company and were signed by Isbrandtsen's agent. The goods were placed in the vessel's holds by the charterer's stevedores. Whether or not to declare the ship off hire was

[109] Plaintiffs' Exhibit 18.

[110] United States Carriage of Goods by Sea Act 3(3); 46 U. S. C. A. 1303(3).

at the option of the charterer. Until that option was exercised, strike or no strike, [44] the owner was subject to the order of the charterer with respect to the receipt and transportation of cargo.

All that connects American-Hawaiian directly with the plaintiffs is the charter party, i. e., the contract of carriage. Plaintiffs claim that American-Hawaiian was negligent in not refusing to accept the cargo tendered and loaded aboard the Hawaiian. To have refused the cargo is all that could have been done by American-Hawaiian. Actions must be judged at the time and in the circumstances of late August and early September, 1948. No one knew what the eventual outcome of the negotiations would be. If American-Hawaiian had refused to accept the cargo and the strike had not occurred or lasted only a short time, this Court might well be determining a case of breach of contract brought by the shipper and charterer against American-Hawaiian for refusal to accept the cargo. Masse's decision to take cargo aboard even after the stewards struck was reasonable, as was the decision to accept the cargo in the first place.

The collective bargaining that was being had was between all West Coast ship operators on [45] the one hand and all West Coast unions on the other. American-Hawaiian might have capitulated on its own and the unions might have worked American-Hawaiian vessels alone among West Coast operators. However, the industry is not run that way. The strength the unions have by their number is balanced by the strength the operators have in bargaining as a unit. It is not for this Court to condemn this practice and saddle upon American-Hawaiian any loss plaintiffs might have sustained because they did not on their own come to terms with the unions.

In the event liability were found as to either Isbrandtsen or American-Hawaiian the charter party would con-

trol the manner of distributing that liability as between them. Since no liability is present we need not investigate the relationships created by the charter party.

Although in this opinion we have dealt with the merits of all of the plaintiffs' contentions we deem it advisable to pass upon the various defenses of the defendants relating to statutes of limitation. In our view of the matter plaintiffs' claims against [46] the carriers are grounded in the federal law affecting water carriers in foreign commerce, thereby making applicable the United States Carriage of Goods by Sea Act.[111] Once the stevedores hired by Isbrandtsen started loading the caustic soda into the holds of the Hawaiian the goods were no longer merely "awaiting shipment"[112] and the caustic soda was then in the custody of the carrier. Plaintiffs' claims against Isbrandtsen and American-Hawaiian largely relate to this period. The one-year limitation on the bringing of actions contained in the United States Carriage of Goods by Sea Act is applicable to these claims.[113] Because we believe this to be a federal matter, under the Supremacy Clause,[114] it is essentially unnecessary for this Court to determine the applicability and effect of state statutes of limitation or prescription, and for the same reason *Guaranty Trust Co. v. York*[115] would appear to have no application to this case.[116]

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[111] *Mackey, et al., v. U. S.*, 197 F. 2d 241 (2d Cir. 1952), *aff'd.* 83 F. Supp. 14 (S. D. N. Y. 1948); see the United States Carriage of Goods by Sea Act 2, 3(2), 46 U. S. C. A. 1302, 1303(2).

[112] Plaintiffs' Exhibit 4 (Dalton deposition); Defendants' Exhibit B, paragraph 6.

[113] United States Carriage of Goods by Sea Act 3(6); 46 U. S. C. A. 1303(6).

[114] U. S. Const., Art. VI.

[115] 326 U. S. 99 (1945).

[116] "We put to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law (citing cases). Our problem touches transactions for which rights and obligations are created by one of the States, and for the assertion of which, in case of diversity of the citizenship of the parties, Congress has made a federal court another available forum." *Guaranty Trust Co. v. York*, 326 U. S. 99, 101 (1945).

The language of 3(6),[117] the limitations provision, that the carrier be discharged from liability "in respect of loss or damage" is broad enough to encompass plaintiffs' claims of negligent [47] delay, negligence in doing any loading at all, fraud and conversion (if they had been proved). The Supreme Court had occasion to pass upon a similar problem of construction in *New York, Philadelphia & Norfolk Railroad Company v. Peninsula Produce Exchange of Maryland*,[118] and said:

> "The words 'any loss, damage or injury to such property,' caused by the initial carrier or by any connecting carrier, are comprehensive enough to discharge a carrier's duty with respect to any part of the transportation to the agreed destination."[119]

All of the caustic soda was delivered into the custody of the Bombay Port Trust by March 12th, 1949.[120] All of the caustic soda was received by the plaintiffs from the Bombay Port Trust by March 17th, 1949.[121] No written notice of any loss or damage was given to Isbrandtsen or their agents within the time specified in the United States Carriage of Goods by Sea Act 3(6).[122] The complaint in this suit was not filed until October 27th, 1950. More than nineteen months [48] elapsed between the time of delivery to the plaintiffs and the bringing of the action. The one-year limitation of actions contained in the United States Carriage of Goods by Sea Act 3(6)

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[117] "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: * * *"

[118] 240 U. S. 34 (1915).

[119] At page 38.

[120] Plaintiffs' Exhibit 5 (Kacocha deposition), page 20.

[121] Plaintiffs' Exhibit 2 (Badhwar deposition); Defendant Isbrandtsen's Exhibit C.

[122] 46 U. S. C. A. 1303(6).

bars the plaintiffs from whatever remedy they might have been entitled to with respect to their claims against the carriers.

If, however, it be thought that plaintiffs' claims against the carriers and the rights they contend have been violated are state created, then we feel that whatever plaintiffs' rights may have been with respect to any alleged negligence, fraud or conversion by either Colorado or the carriers they have been extinguished. Which brings us to the question of what is the applicable law? This Court in determining state created rights must apply the rules of conflict of laws that the Courts of the State of New York would apply.[123] Under its conflict of laws principles the substantive law that the New York courts would look to on the negligence, fraud and conversion claims would appear to be the *lex loci delicti*.[124] In the case before us that would be the law of the State of Louisiana. Were we free to determine this of [49] our own choice the result would be the same, as Louisiana was the state in which the acts complained of principally occurred. It was the focus of activities and the place of paramount contacts.[125] Viewing this another way, since we as a federal court are dealing with statutes of limitation and of prescription concerning state created substantive rights we are required to apply the law that would be applied as if this suit were brought in a court of the State of New York and in a manner so as not to affect the outcome of the litigation simply because the parties are in a federal forum.[126] By the application of 13 of the New

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[123] *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941).

[124] *Poplar v. Bourjois, et al.*, 298 N. Y. 62, 80 N. E. 2d 334 (1948); *Coster v. Coster*, 289 N. Y. 438, 46 N. E. 2d 438 (1943); *Cherwien v. Geiter*, 272 N. Y. 165, 5 N. E. 2d 185 (1936).

[125] See Cheatham, Goodrich, Griswold and Reese, Cases and Materials on Conflict of Laws 420, *et seq.* (3rd Ed. 1951).

[126] *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945).

York Civil Practice Act[127] we are referred to the statutes of limitation and of prescription of the State of Louisiana. Louisiana follows the civil rather than the common law, and according to its law statutes of prescription extinguish the eright rather than in the ordinary case at common law bar the remedy.[128] However, in terms of the meaning to litigants the effect is the same. Article 3536 of the Louisiana Civil Code provides that actions "resulting from offenses or quasi offenses" are prescribed within one year.[129] What are regarded [50] in the State of Louisiana as offenses and quasi offenses are what the common law denominates as torts. The Supreme Court of Louisiana has held that this one year period of prescription applies to actions in negligence,[130] to actions in fraud,[131] and we take the opinion and judgment of the Court of Appeals for the Fifth Circuit in *Colley v. Canal Bank & Trust Company*[132] as expositive of the law of Louisiana that Article 3536 applies to actions for conversion.

Plaintiffs urge that Article of the Louisiana Code of Practice treats statutes of limitation and of prescription

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[127] "13. Limitation where cause of action arises outside of the State. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *"
Plaintiffs herein are not residents of the State of New York.

[128] Compare *DeBouchel v. Koss Const. Co., Inc., et al.*, 180 La. 615 157 So. 270 (1934) with *Wood & Selick v. Compagnie Generale Transatlantique*, 43 F. 2d 941 (2d Cir. 1930).

[129] "Art. 3536: The following actions are also prescribed by one year:

"That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses."

[130] *Sima v. New Orleans Ry. & Light Co.*, 134 La. 897, 64 So. 823 (1914).

[131] *Thomas v. Whittington, et al.*, 127 La. 551, 53 So.

[132] 159 F. 2d 153 (5th Cir. 1947).

as procedural and to be governed by the *lex fori*,[133] and therefore even if New York Civil Practice Act 13 refers over to the Louisiana prescriptive statute, Louisiana refers the matter back to New York creating in effect a *renvoi* situation. Whether the New York rule of conflict of laws is that New York courts are required to look only to the substantive law of the *lex loci delicti* or whether it is that New York courts must look to both the substantive and conflicts law of the *lex loci delicti* need not concern us in the light [51] of the language of 13 of the New York Civil Practice Act and the construction the New York courts have given it.[134] The policy motivating this section is to preclude persons from coming into New York courts to sue on a foreign cause of action which would be barred in the foreign jurisdiction, i. e., permitting a suit to proceed in New York when it would be barred if brought in the appropriate forum.[135] New York would therefore apply the Louisiana statutes of prescription without regard to Article 13 of the Louisiana Code of Practice.[136]

Little need be said of the plaintiffs' claim of damage to some 60,000 pounds of caustic soda. There is no evi-

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[133] "The forms, the effects and the prescription of actions, are governed by the law of the place where they are brought; but contracts are governed by the law of the place where they were entered into."

[134] To create a renvoi situation here requires more than this. It is necessary to say that the New York conflicts rule is that it will look to the state of the *lex loci delicti* and examine its substantive law, its law with respect to conflict of laws and its law with respect to statutes of limitation. Absent a specific statutory mandate New York adheres to the distinction between substantive and procedural matters and in general considers statutes of limitation procedural and going to the remedy, therefore to be governed by the law of the forum. However, in this case we have an explicit provision, 13 of the New York Civil Practice Act, to construe. Such a borrowing statute is in reality a legislative determination of the rule of conflict of laws to be applied when a question arises as to the applicable statute of limitation.

[135] See *National Surety Company v. Ruffin*, 242 N. Y. 413, 417, 152 N. E. 246, 247 (1926).

[136] The question of the relationship of statutes of limitation and applicable law in admiralty causes was recently extensively analyzed and considered in *Bournias v. Atlantic Maritime Co., Ltd., et al.*, 220 F. 2d 152 (2d Cir. 1955).

dence indicating that there was any physical damage to the 526 drums when they were delivered into the custody of Isbrandtsen. In fact, the two on board bills of lading issued by Isbrandtsen covering the entire 4799 drums shipped noted no exceptions and acknowledged receipt of the goods "in apparent good order and condition."[137] In other words they were clean bills of lading and as such constituted *prima facie* proof that the drums were in good order and condition at that time.[138] [52] Thus plaintiffs' claim must be limited solely as one for cargo damage and is clearly time barred.[139]

The complaint is dismissed without costs. Since there is no liability on the part of Isbrandtsen to the plaintiffs, the cross-claim of American-Hawaiian against Isbrandtsen is similarly dismissed.

Submit judgment.

August , 1955.

U. S. D. J.

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[137] Plaintiffs' Exhibit 1, Schedules AO and AS.

[138] See 33 A. L. R. 2d 867 (1954) for a collection of cases.

[139] United States Carriage of Goods by Sea Act 3(6); 46 U. S. C. A. 1303(6).

Plaintiffs' Exhibit 1 (In Part).

(Stipulation of Facts Identifying Documents.)

[Same Title.]

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that:

1. The documents which are attached hereto as "schedules" with alphabetical designation are hereby admitted to be true and correct copies of the documents respectively designated and described below;

* * * * * * *

3. Any facts stated below with respect to any described document are also deemed to be admitted for all purposes in this action;

* * * * * * *

6. The said documents are as follows:

Schedule A: Cablegram sent by The National City Bank of New York, New York Branch, to the National City Bank of New York, Bombay Branch, on August 2, 1948, at the request of The Colorado Fuel and Iron Corporation.

Schedule B: Cablegram sent by said National City Bank, Bombay Branch, to said National City Bank, New York Branch, on August 3, 1948, the contents of which were communicated to The Colorado Fuel and Iron Corporation.

* * * * * * *

Schedule P: Cablegram from Colorado Fuel and Iron Corporation, 500 Fifth Avenue, New York, to Mulkraj Brothers and Badhwar care Citibank, Bombay, sent August 10, 1948, and received August 11, 1948.

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Plaintiffs' Exhibit 1 (in Part)

Schedule AA: Cablegram from W. A. Bartle, New York, to Mulkraj Brothers and Badhwar care Citibank, Bombay, sent August 19, 1948, and received August 20, 1948.

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Schedule AD: Cablegram from Colorado Fuel and Iron Corporation, New York, to Laxmansons, Lucknow, sent and received on August 26, 1948.

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Schedule AF: Cablegram from Laxmansons, Lucknow, to Wickspen (cable and telegraphic address of The Colorado Fuel and Iron Corporation) care Colorado Fuel and Iron Corporation, New York, sent and received August 26, 1948.

* * * * * * *

Schedule BC: Letter dated September 20, 1948, from The Colorado Fuel and Iron Corporation, New York, signed M. R. Rosse, General Export Sales Manager, to Mulkraj Bros. & Badhwar, Lucknow, sent on or about September 20, 1948, and received on or prior to September 27, 1948.

Schedule BD: Letter dated September 27, 1948, from Mulkraj Bros. & Badhwar, Lucknow, signed R. S. Dass Badhwar, Partner, to Messrs. The Colorado Fuel & Iron Corporation, 500 Fifth Avenue, New York, sent on or about September 27, 1948, and received October 4, 1948.

Schedule BE: Cablegram from Colorado Fuel and Iron Corporation, New York, to Laxmansons, Lucknow, sent and received on October 9, 1948.

Schedule BF: Cablegram from Laxmansons, Lucknow, to Colorado Fuel and Iron Corporation, New York, sent on October 9, 1948, and received on October 11, 1948.

* * * * * * *

Plaintiffs' Exhibit 1 (in Part)

Schedule BH: Letter dated January 8, 1949, from Mulkraj Bros. & Badhwar, Lucknow, signed R. S. Dass Badhwar, Partner, to M/S Colorado Fuel & Iron Corporation, 500 Fifth Avenue, New York, sent on or about January 8, 1949, and received January 17, 1949.

Schedule BI: Letter dated January 12, 1949, from Mulkraj Bros. & Badhwar, Lucknow, signed R. S. Dass Badhwar, Partner, to M/S. Colorado Fuel & Iron Corporation, 500 Fifth Avenue, New York, sent on or about January 12, 1949, and received January 18, 1949.

Schedule BJ: Letter dated March 15, 1949, from The Colorado Fuel and Iron Corporation, Denver, Colorado, signed N. H. Orr, Vice President, to Mulkraj Bros. & Badhwar, Lucknow, sent on or about March 15, 1949, and thereafter received.

Dated, New York, N. Y., November 30, 1950.

DUNN & ZUCKERMAN
By: JAMES F. DUNN
Attorneys for Plaintiffs
RATHBONE, PERRY, KELLEY & DRYE
By: FRANCIS S. BENSEL
Attorneys for Defendant
The Colorado Fuel and Iron Corporation

Plaintiffs' Exhibit 1 (in Part)

Schedule A.

COLORADO FUEL & IRON CORPORATION HAS EXPORT LICENSE 4300 TONS CAUSTIC SODA SOLID 76% ALKALINITY N.Y. & L. TEST FOR IMMEDIATE DELIVERY AT NINE CENTS PER POUND FAS GULF PORTS OR 10.102¢ PER POUND CIF BOMBAY PACKED 700 POUND STEEL DRUMS STOP PLEASE CABLE REPLY EARLIEST NAME BUYER POSSESSING IMPORT LICENSE AND ABLE OPEN CREDIT AT ONCE COMPANY URGENTLY INTERESTED COMPLETING TRANSACTION STOP ALSO CABLE IMMEDIATELY TREND MARKET PRICES CAUSTIC SODA STOP THIS HAS NO REFERENCE YOUR CABLE NUMBER EIGHT.

Schedule B.

YOUR TWO CAUSTIC SODA 98/99 PERCENT READY DELIVERY RUPEES FIFTY PER HUNDRED WEIGHT MONTH AGO WAS RUPEES EIGHTYFIVE AND TRADE FORESEES POSSIBLE FURTHER DECLINE RUPEES TEN NO FORWARD QUOTATION AVAILABLE STOP SPECULATIVE ELEMENT SELLING IN VIEW COMBINATION MONSOON WEATHER SHORTAGE PROTECTED STORAGE SPACE EXPECTED FURTHER SUBSTANTIAL ARRIVALS POSSIBILITY PURCHASING FROM EUROPE AT PRICES BELOW AMERICAN AND UNDER OPEN GENERAL IMPORT LICENSE FOR SOFT CURRENCY AREAS STOP SO FAR OUR CONTACTS SHOW NO INTEREST COLORADO FUEL OFFER SAYING AMERICAN 98/99 PERCENT QUALITY BEING OFFERED BETWEEN NINE AND TEN CENTS CIF STOP.

Plaintiffs' Exhibit 1 (in Part)

Schedule P.

. CABLE RECEIVED AUGUST NINTH FROM YOUR OFFICE LUCKNOW SPECIFIES SHIPMENT TO CALCUTTA AND GIVES IMPORT LICENSE NUMBER 000417-48. OUR NEGOTIATIONS INVOLVE BOMBAY SHIPMENTS ONLY PLEASE HAVE YOUR OFFICE CONFIRM BOMBAY AND CABLE EXACT IMPORT LICENSE NUMBER OR NUMBERS. URGENT REPLY NECESSARY AS OPTION ON BOAT SPACE EXPIRES FRIDAY. ANSWER TO BARTLE COLORADO FUEL IRON CORPORATION 1616 EYE STREET WASHINGTON. (Formal parts omitted.)

Schedule AA.

CREDIT RECEIVED 239,000 FAVOR W A BARTLE STOP BENEFICIARY MUST BE AMENDED TO READ COLORADO FUEL AND IRON CORPORATION 500 FIFTH AVENUE ALSO USE SAME NAME FOR FUTURE CREDITS URGE YOU USE ALL HASTE. (Formal parts omitted.)

Schedule AD.

IF SHIPMENT ON THE BALANCE OF $186,600 IS TO GO OUT ON PRESENT STEAMER MUST HAVE COMPLETED CREDIT ARRANGEMENTS IMMEDIATELY. (Formal parts omitted.)

Plaintiffs' Exhibit 1 (in Part)

Schedule AF.

YOUR CABLE TWENTYFIFTH LETTER CREDIT 186600 DOLLARS ALSO ESTABLISHED YOUR FAVOUR. (Formal parts omitted.)

Schedule BC.

We have just received your letter of September 9, No. 183, confirming your recent cable to the effect that you are endeavoring to obtain extension of your import license. Please accept our thanks for this information.

It has just come to our attention that the steamship Hawaiian of the Isbrandtsen Lines, which was scheduled to sail from New Orleans on or about September 3, and on which we had booked a total of 4,799 drums of caustic soda, has been held up at New Orleans on account of a marine strike.

We have felt that as a courtesy to you and for your information, you should be advised of this situation. (Formal parts omitted.)

Schedule BD.

We are sorry to note, the marine strike at New Orleans holding up the sail of Hawaiian of the Isbrandtsen lines and thus causing delay in the movement of Soda Caustic shipped by the same. We shall thank you if you kindly inform us when the strike is called off and the steamer sets sail. (Formal parts omitted.)

Plaintiffs' Exhibit 1 (in Part)

Schedule BE.

ADVISE IMMEDIATELY RETURN CABLE POSSIBILITY OF SECURING IMPORT PERMIT AND EXTENSION LETTER OF CREDIT FOR BALANCE YOUR ORDER ON CAUSTIC SODA. (Formal parts omitted.)

Schedule BF.

REFER YOUR CABLE NOT POSSIBILITY FOR IMPORT LICENSE EXTENSION STOP TREAT REMAINING ORDER CANCELLED. (Formal parts omitted.)

Schedule BH.

Please refer to our letter dated August 9, 48 wherein we had placed an order with you for 2000 tons of Caustic Soda. The goods were to be shipped immediately partly from Golf Port and partly from some other port. As you could not ship the whole quantity within time, our Import License of 510 tons, got expired and you booked only 1490 tons of Caustic Soda.

We had purchased this material in the month of August, 1948 rightly presuming that if immediately shipped we shall have the Caustic Soda of our order latest by the end of October 1948. On this assumption, the undersigned left Bombay in the last week of October 48, but after

Plaintiffs' Exhibit 1 (in Part)

waiting there for 2 3/4 months he had to come away disappointed. The above ship had not arrived at Bombay even till today.

When we had placed the order in the month of August, 48, the rate of Caustic Soda in the Indian Market was about Rs. 60/- per cwt. & had we got the material in the month of October 48, we would not have suffered any loss. But now the rate of the Caustic Soda in the Bombay market has gone down to Rs. 25/- per cwt.

Not only that. The Import Duty on Caustic Soda has also been raised by the Government of India by Rs. 4/8/- per cwt. It used to be only Rs. 7/8- per cwt., but now from January 1, 1949 it has gone up to Rs. 12/- per cwt. Just on this Score (Import Duty increase) we shall have to pay an extra sum of Rs. 29800/- or about $9000.00.

Regarding the lowering of the rate of Caustic Soda, you can verify from your own market. Instead of 9.5 cents per pound American firms are now offering @ 5 cents per lb.

Calculating at the present day rates the Soda Caustic our loss amounts to Rs. 685400/- or approximately $195,620.00. It is a stunning loss, and would shake even the most soundly financed concerns.

But we hope that you will let us survive, and would not allow us to suffer a loss for which we are not responsible. You know best as to how you can help us. Our partner has had & still has dealings with many U.S. firms of repute and has been highly impressed with their realistic way of doing business. We hope you will surely come to our rescue and will not disappoint us. (Formal parts omitted.)

Plaintiffs' Exhibit 1 (in Part)

Schedule BI.

In continuation of our letter referred above we beg to state that we have miscalculated the loss due to the increase in duty from January 1, 1949 (para 4 of our above quoted letter). The actual increase in duty amounts to Rs. 1,34,100/- or about $40,230.00 and not Rs. 29800/- or about $9000.00 as stated in our previous letter in question.

Please correct your record accordingly. (Formal parts omitted.)

Schedule BJ.

Receipt is acknowledged of your letters of January 8, 1949 and January 12, 1949, Nos. 419 and 422, respectively, with reference to the 1490 tons of Caustic Soda which were delivered on board the Steamship Hawaiian and shipped by us to you or September 3, 1948.

We regret to note that the failure of the Steamship Hawaiian to arrive in Bombay by the end of October, 1948 as you had expected, and the ensuing increases in the Import Duty on Caustic Soda and the decrease in the price thereof in the Indian market have caused you the losses mentioned in your letters. However, as timely shipment of the 1490 tons of Caustic Soda was made by us by delivery of the same on board the Steamship Hawaiian at New Orleans, Louisiana, on September 3, 1948 against the issuance and receipt of appropriate on board bills of lading, and as the losses suffered by you were due to events thereafter occurring and as to which the risk was necessarily assumed by you, we believe that we are free of responsibility to you and know of no ground upon which we might justifiably undertake to assume or absorb any portion of your losses. (Formal parts omitted.)

Plaintiffs' Exhibit 2 (In Part).

(Badhwar Deposition.)

R. S. DASS BADHWAR, called and sworn as a witness on behalf of plaintiffs, testified as follows:

Direct Examination by Mr. Dunn:

Q. Mr. Badhwar, are you one of the plaintiffs in this case? A. Yes.

Q. Are you a citizen and resident of the Republic of India? A. Yes.

Q. Is the other plaintiff, R. B. Lachhmandass Mohanlal & Sons, Ltd., a limited company or corporation organized under the laws of the United Provinces now known as Uttar Pradesh? A. Yes.

Q. Which is a province of and in the Republic of India? A. Yes.

Q. And does that limited company do business in that province and country? A. Yes.

Q. And are its shareholders, directors and managing agents citizens and residents of the Republic of India? A. Yes.

Q. Do you, together with the firm of R. B. Lachhmandass Mohanlal & Sons, Ltd., constitute a partnership which has been registered under the laws of that province and which does business in that province and country? A. Yes.

* * * * * * *

[22] *Cross Examination by Mr. Bensel:*

Q. Mr. Badhwar, what is your business? A. I am general manager of sugar mills, general manager of R. B. Lachhmandass Mohanlal & Sons, Ltd., [23] sugar mills, Jarwal Road, O. T. Rly., India, and a partner of Mulkraj Brothers & Badhwar.

Q. And were you general manager and partner of that firm in August of 1948? A. Yes.

Plaintiffs' Exhibit 2 (in Part)

Q. And you still are? A. In August, 1948, I was not general manager.

Q. What were you? A. I was only a partner and consultant to them in their head office at Lucknow.

Q. What was the nature of the business of this partnership in 1948? A. This partnership business was importing heavy chemicals, caustic soda and soda ash.

Q. Did they use heavy chemicals that they purchased for their own account? A. No, very little.

Q. What was their principal business in connection with heavy chemicals? A. Just to sell.

Q. To resell them? A. Resell them.

Q. Would the firm be what we term brokers in chemicals? A. No. "Dealers," we would call them in India. They would import on their account and sell it.

Q. In connection with the caustic soda that is involved in this action, were they acting as dealers? A. Yes.

Q. For their own account? A. Yes, for their [24] own account.

* * * * * * * * *

[31] *Cross Examination by Mr. Tillinghast:*

Q. Mr. Badhwar, would you tell us who, that is, which of the concerns which are parties plaintiff in this case imported the caustic soda? A. Mulkraj Brothers and Badhwar.

Q. That is the partnership? A. Yes, sir.

Q. Had you done any previous business in the United States? A. What do you mean, previous business?

Q. Had you purchased goods here or sold goods here? A. Yes, we had purchased goods here before.

Q. Over a period of years? A. No, I wouldn't say over a period of years, but we imported some soda ash from here, two consignments.

Q. Two consignments? A. Yes.

Plaintiffs' Exhibit 2 (in Part)

Q. When was that? A. That was in 1948.

Q. Do you remember what vessels those two shipments moved on? A. Yes. I guess one was Flying [32] Trader. Both were, I guess, Isbrandtsen. I don't remember the name of the other. I am trying to think of the names.

Q. Was it another of Isbrandtsen's vessels? A. I couldn't tell you, because there was—well, they came in the normal manner.

Q. Do you remember the dates on which you placed those orders for caustic soda, those two consignments you just referred to as having moved in 1948? A. Caustic soda? This?

Q. No, not this. The two shipments. A. They were soda ash.

Q. The soda ash. Excuse me. Can you give us the dates when those orders were placed? A. No. I couldn't give you the dates.

Q. Do you recall the dates when the vessels carrying those shipments arrived? A. Yes. I remember one did arrive in November, 1948.

Q. And the other one arrived when, do you recall? A. That was probably earlier.

Q. How long in length of time? A. You see, I don't remember the details.

Q. Do you recall the length of time between the time you placed the order for the soda ash and the time [33] when those shipments finally arrived in India? A. No. I can only tell you after looking at the record. I couldn't tell you offhand. But I think it took about five weeks.

Q. Did you travel to the United States by ship on this trip? A. No, I flew.

Q. Have you ever traveled to the United States by ship? A. I have.

Q. Have you ever gotten here in five weeks? A. I got from New York to Bombay in 29 days, leaving here in the first week of January, you see, or about the 12th or 13th of January, 1935.

Plaintiffs' Exhibit 2 (in Part)

Q. And that was on a passenger vessel? A. No, it wasn't a passenger vessel, because we were not carrying passengers only. It was a cargo vessel. And in that connection I can tell you that when I came here from Calcutta to San Francisco, which is the longest route, it took me only 34 days.

* * * * * * *

[62] Q. When you announced to your partners that you were going to come to the United States on business, what business did you have in mind coming here for? A. When?

Q. Just preceding your present trip. A. Just preceding this present trip? Present trip? I didn't come on business before this. I came as a student.

Q. I will state my question a little differently. What reason prompted you to come to the United States on the present trip? A. To pursue this claim.

* * * * * * *

[84] *Re-direct Examination by Mr. Dunn:*

Q. Mr. Badhwar, will you tell us what dates you were in Bombay between the month of October, 1948, and the month of January, 1949? A. I was in Bombay in the last week of October, and till—I don't know the exact date in January, but it was in the beginning. During the first week I returned to Lucknow. I was [85] till then there.

* * * * * * *

Q. When did you first learn of the existence of a strike affecting the S.S. Hawaiian? [86] A. That was from Colorado's letter of September 20th, I think September 20th, which was received in India in the last week of September.

Q. Was that a letter from the Colorado Fuel & Iron Corporation? A. Yes.

Plaintiffs' Exhibit 2 (in Part)

Q. Signed by M. R. Rosse, general export sales manager, to Mulkraj Brothers and Badhwar in Lucknow, dated September 20, 1948? A. Yes.

Q. Prior to that time, did you have any knowledge whatever of either a threatened or an actual strike of any sort? A. No.

Q. Which might affect the shipment of the caustic soda that you bought from Colorado Fuel & Iron Corporation? A. No.

Q. Mr. Bensel asked you about a letter of January 8, 1949, from you to Colorado Fuel & Iron Corporation? A. Yes.

Q. In which there was what you testified was a wrong computation of certain figures? A. Yes.

Q. Just how was that error in computation corrected? A. By my subsequent letter dated January 12, 1949.

Q. After that time, and after the actual arrival of the goods in Bombay, did you make any further written [87] demands upon the Colorado Fuel & Iron Corporation? A. Yes.

Mr. Bensel: I object to the form of the question.

Mr. Dunn: Off the record.

(Discussion off the record.)

Q. Did you write additional letters to defendant, Colorado Fuel & Iron Corporation? A. Yes.

Q. And did you write letters to other persons, to be communicated to Colorado Fuel & Iron Corporation? A. Yes.

Q. Would you have come to the United States on this trip except for this claim? A. No.

Q. Was all of the caustic soda involved in this action purchased for resale? A. Oh, yes.

Q. Has any part of it whatever been consumed by yourself or any firm affiliated with you? A. No.

Mr. Dunn: That is all.

Plaintiffs' Witness, Charles J. Conlon, Direct

Re-cross Examination by Mr. Bensel:

Q. You stated in answer to your counsel's question that you wrote letters to other persons to be communicated to Colorado Fuel & Iron Corporation? [88] A. Yes.

Q. To whom were you referring? A. To the National City Bank of New York at Bombay, who were the intermediaries in this transaction. Then I wrote to our Ambassador in Washington. Then I also wrote to the Government of India, Commerce Department. And I also wrote to the Consul General for India in New York.

Q. I gather, then, that you wrote to each of those individuals or governmental departments requesting them, in turn, to communicate with Colorado, is that right? A. Yes.

Q. Or did you ask them to intercede on your behalf with Colorado? A. I asked them to intercede, to make Colorado pay up our claim.

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Trial Minutes.

[121]

(Testimony of Charles J. Conlon.)

CHARLES J. CONLON, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Dunn:

Q. Mr. Conlon, what is your occupation? A. I am engaged as a foreign freight forwarder doing business under the name of Shippers Export Service Company, which I have—

Q. Where is your office? A. 368 Broadway, New York City.

Plaintiffs' Witness, Charles J. Conlon, Cross

Q. How long have you been engaged in the export freight business or freight forwarding business? A. Since 1928.

* * * * * * * *

[137] By Mr. Dunn:

Q. Confining yourself to the period June, July, August and September, 1948, at that time was it the custom in the industry for a freight forwarder to make inquiry as to ownership of the vessel, or the company which was going to navigate the vessel? A. You are shipping goods on a certain line that usually have the same run of vessels. If you come across one that is strange, one new to that service, then you ask the solicitor, who is your personal contact with the steamship line, or your booking agent, who is another personal contact, where they got this vessel from and the nature of it and whether it was under charter, and so forth.

Mr. Dunn: No further questions.

Cross Examination by Mr. Bensel:

Q. Do I gather, Mr. Conlon, that the only reason you would make this inquiry as to the ownership of the ship would be to satisfy yourself in respect to insurance problems? A. Well, as I mentioned, if a ship would come into a certain service we would make inquiries, too.

[138] Q. You mean a ship you never heard about before? A. That's right.

Q. But if you had heard about the ship before you wouldn't make any further inquiry? A. Yes, you would, because there are certain ships that stay in one service continually, and when you get one that comes in now and then, then you would ask what the reason was.

Plaintiffs' Witness, Charles J. Conlon, Cross

Q. In that case you would make inquiries as to the ownership of the ship and the name of the charterer who chartered it, is that right? A. Well, you wouldn't have to know the name of the charterer. You would make your inquiry through the company that had it under charter and you would ask them the particulars.

Q. After you found out that the ship was owned by the X, Y, Z shipping company, what did you do about it? A. That all depends on the nature of the shipment.

Q. In other words, you would try to satisfy yourself if that was a proper ship to carry the cargo, isn't that right? A. Our duty is to have a continual flow of export without interruptions, and if we feel that a boat is going to be tied up, we try to avoid it.

[139] Q. You mean if you find that the boat is going to be tied up you try to avoid it—is that what you say? A. Yes.

Q. Tied up by what? A. By any trouble.

Q. Such as? A. Strikes, late arrival in the port. For instance, if you have several hundred tons of cargo laying around waiting for a vessel to come in and you found out it is going to be late, you would divert that cargo to another vessel so that you can get it out, otherwise you can lose your account.

* * * * * * *

[154] *Cross Examination by Mr. Scott:*

Q. Do you know who owns the S.S. Hawaiian? A. American-Hawaiian Steamship Company.

Q. Did you know that in August, 1948? A. Yes.

Q. Would any shipping agent or freight forwarder generally seeing that name know who the owner was? A. Yes.

Q. It is a matter of common knowledge, isn't it? A. Yes, that's right.

Plaintiffs' Witness, Charles J. Conlon, Cross

Q. If the ship was under charter the freight forwarder would assume that the Hawaiian crew was on board the ship? A. That's right.

Q. And any freight forwarder generally would [155] have the same information you have? A. That's right.

Q. There is no mystery about these things among freight forwarders? A. No.

Q. They make it their business to know what goes on? A. It is our bread and butter and we should.

* * * * * * *

[157] *Cross Examination by Mr. Tillinghast:*

Q. Mr. Conlon, as a freight forwarder you are engaged by exporters to make the usual transportation arrangements for the export of their goods, is that true? [158] A. Yes, sir.

Q. You engage space on a ship and prepare documents and so forth? A. Also arrange delivery.

Q. That is the general function of a freight forwarder, isn't it? A. That's right.

Q. You stated in answer to Mr. Dunn's question that among your duties and activities you are in and out of the Customs House and in and out of steamship company offices and exporters' offices, is that true? A. That's right.

Q. And in that manner you keep informed of what is going on in the trade? A. That's true.

Q. Isn't that also the function of any freight forwarder? A. Yes, sir, it is.

Q. You listed among your other qualifications that you were assistant traffic manager for Sterling Products? A. That's right.

Q. Is it part of the duties of a traffic manager to likewise keep informed of shipping conditions and transportation problems? A. Yes, sir, it is.

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Defendant Colorado's Witness, Frederick R. Becker, Jr., Direct.

[213]

(Testimony of Frederick R. Becker, Jr.)

FREDERICK R. BECKER, JR., called as a witness in behalf of Colorado Fuel and Iron Corporation, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bensel:

Q. Mr. Becker, where do you reside? A. In New Orleans, Louisiana.

Q. Are you connected with the Farrell Shipping Company? A. Yes, I am.

Q. In what capacity? A. As secretary-treasurer.

Q. And what is the business of Farrell Shipping Company? A. Freight brokerage and forwarding.

* * * * * * *

[215] Q. Did there come a time in the summer of 1948 when your firm was requested by Colorado to book certain space for a shipment of caustic soda? A. Yes.

* * * * * * *

[217] Q. With whom did you make the arrangements for space for this merchandise? A. Well, we were finally successful in getting space from Isbrandtsen Steamship Company through their agents, Hansen & Tidemann.

Q. In New Orleans? A. Yes.

Q. And did you, on behalf of Colorado, enter into a freight engagement contract? A. We did.

Mr. Bensel: Your Honor, that has been offered in evidence and I am not going to take any time with that.

Q. That was on July 29th, wasn't it? A. I think that's correct.

Q. Did that contract specify the boat? A. Yes, it named the SS Jane G. Swisshelm or equal A-1 substitute, as I recall.

Defendant Colorado's Witness, Frederick R. Becker, Jr., Direct

Mr. Tillinghast: Will you fix the date of the contract, please?

Mr. Bensel: July 29. It has been marked in evidence.

Q. At the time you were negotiating with Hansen & Tidemann for this space, did you learn from them that the SS Jane Swisshelm had been chartered by Isbrandtsen? [218] A. Yes, that is correct.

Q. Did they inform you what kind of a charter it was? A. Yes, they stated Isbrandtsen had a bare boat charter on that vessel.

Q. Did there come a time when Hansen & Tidemann advised you that Isbrandtsen desired to substitute a vessel for the Swisshelm? A. Yes.

Q. Do you remember when that was, approximately? A. No. It was either at the time of the first booking or shortly thereafter.

Q. Did they tell you the name of the vessel that they were going to substitute? A. Not at that time. It was not known. Later they did.

Q. Well, did there come a time in August, 1948, when they advised you of the name of the vessel to be substituted? A. Yes.

Q. What was it? A. The SS Hawaiian.

Q. When you were advised the Hawaiian had been substituted, did Hansen & Tidemann advise you whether [219] that had been chartered by Isbrandtsen? A. I don't believe they did. I'm not positive of that point.

Q. Did they advise you what kind of a charter arrangement existed between— A. No.

Q. —Isbrandtsen and the owner of the Hawaiian? A. No, definitely not.

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Defendant Colorado's Witness, Frederick R. Becker, Jr., Direct

[220] Q. Mr. Becker, after you made your arrangements with Hansen & Tidemann for the transportation of this merchandise, did you communicate that fact to Colorado Fuel? A. Yes.

* * * * * * * *

[221] Q. Subsequent to the writing of this letter of July 29th to Mr. DeBoer, did Colorado thereafter request your firm to see whether you could book 500 additional tons of caustic soda? A. Yes, they did.

Q. And did you make these arrangements? A. We did.

Q. With Hansen & Tidemann? A. Yes, with Hansen & Tidemann.

Q. Prior to this request for increased space you had been advised, had you not, that Isbrandtsen had substituted the SS Hawaiian for the Swisshelm? A. Yes, I believe it was about two days before we finalized the arrangements for the additional tonnage.

Q. Did Hansen & Tidemann advise you at that time when the latest shipside delivery had to be made aboard the Hawaiian? A. I believe they did. I think, if I recall correctly, it was about August 30th or September 1st.

Q. I show you a telegram of yours dated August 17, 1948, and see whether that will refresh your recollection as to the latest shipside delivery date given to you (handing)? A. (Examining) Yes.

[222] Q. What was it? A. September 2nd.

* * * * * * * *

[225] Q. Mr. Becker, if you had known that the S.S. Hawaiian had aboard a west coast crew when it was substituted for the Swisshelm, and if you had knowledge or if you had known that fact at any time thereafter and before September 2nd or 3rd, would that fact have caused you to change the arrangements then in effect for the shipment of this merchandise? A. No.

Defendant Colorado's Witness, Frederick R. Becker, Jr., Direct

Q. Did you as the representative of Colorado consider that you had a firm engagement for that space with Hansen & Tidemann? A. Yes, we had a firm booking with Hansen & Tidemann and Isbrandtsen was within their rights in substituting a vessel.

Mr. Dunn: I move to strike out the latter part of the answer.

The Court: Yes, that is a matter for me to determine as a matter of law.

[226] The Witness: I see.

The Court: I understand, though, that there is no contention made by the plaintiffs that there was any damage suffered by reason of the substitution of ships.

Mr. Dunn: Well, as part of the general picture, that is how this ship got into the case.

The Court: All right.

Q. In your examination in New Orleans you had been questioned by Mr. Dunn as to what knowledge or information you had in the months of June, July and August, 1948, about an impending or threatened strike. Do you remember being asked questions on that subject? A. Yes.

Q. And I believe you testified in substance that you did not recall whether you had read in the newspapers about that matter? A. That is correct.

Q. And to refresh your recollection you testified in substance that you would have to refer to the newspapers to answer the question? A. Correct.

Q. Have you since that examination in New Orleans at my request read over certain news articles appearing [227] in New Orleans papers contained in this transcript of newspaper stories re the 1948 maritime strike that was marked here as an exhibit upon the depositions in New Orleans—

Defendant Colorado's Witness, Frederick R. Becker, Jr., Direct

Mr. Dunn: Subexhibit to Exhibit 4.

Q. Subexhibit to Exhibit 4? A. Yes, I have looked this over and refreshed my memory.

Q. Having looked at those newspaper articles, does that now refresh your recollection that in the summer of 1948 you kept abreast of the news articles? A. Well, it is evident I must have read all or some of those because of the long period—due to the long period of time in which they were published in the press.

Q. And, of course, you had an interest in maritime matters and the subject matter of these articles? A. Yes.

Q. Having refreshed your recollection from these news articles, did there come a time in August, 1948, when you learned that the threatened strike at the Port of New Orleans had been settled? A. Yes, the papers, the articles reported that the Atlantic and the Gulf situation had been settled.

[228] Do you remember about when you learned that? You can look at those articles to refresh your recollection.

Mr. Tillinghast: If it please the Court, I think you will find that the testimony has a purpose of impeaching this witness' testimony that he gave in New Orleans at that time.

Mr. Bensel: If your Honor please, this isn't an objection and I am not impeaching the witness. I have read the testimony over carefully—

The Court: I don't want any arguments from either side, and if it is in the nature of an objection it is overruled.

A. About August 18, 1948.

The Court: Have this paper that the witness is looking at now identified on the record.

Mr. Bensel: I did, your Honor.

The Court: This is one of the exhibits?

Mr. Bensel: Yes, your Honor.

The Court: What exhibit is it?

Mr. Bensel: It is an exhibit attached to Exhibit 4 of the depositions down in New Orleans. I think I identified it on the record. It does not have an actual exhibit number.

[229] The Court: We have taken it in evidence as part of Exhibit 4?

Mr. Bensel: Yes, sir, that is correct.

The Court: This is a compilation which contains an affidavit—

Mr. Bensel: That is right.

The Court: —by some lady down there.

Mr. Bensel: That is right.

The Court: By a Miss Farley?

Mr. Tillinghast: O'Brien.

Q. Having refreshed your recollection from these news articles, were you in August, 1948, in a position to form an opinion as to whether a strike would be called on or after September 2, 1948, that would affect shipping in the Port of New Orleans? A. I did form the opinion that there would be no trouble at New Orleans, there would be no strike there.

The Court: Well, did you have that opinion and belief?

The Witness: Yes, sir.

The Court: Did you communicate that opinion or belief to anybody in writing in this case, Colorado or anybody else?

[230] The Witness: No, sir, I did not.

The Court: Was that opinion and belief predicated upon any communication written or otherwise that you had received from either the American Hawaiian Steamship Company or Isbrandtsen?

The Witness: No, sir.

Defendant Colorado's Witness, Frederick R. Becker, Jr., Cross

By Mr. Bensel:

Q. What was it based on? A. It was based on these news reports.

Q. That the strike had been settled? A. Yes, sir.

Q. The threatened strike? A. That is the only source of our information.

Q. In this period, June, 1948, through early September, 1948, did you talk with, write to, Hansen & Tidemann, Isbrandtsen, or any other representatives of the Isbrandtsen Line in regard to this threatened strike? A. No, I don't believe I did.

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[262] Mr. Bensel: On the record, your Honor, we have checked. September 3rd was the Friday before Labor Day and the 7th was the Tuesday after Labor Day.

The Court: The Court will take judicial notice of that.

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Cross Examination by Mr. Tillinghast:

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[266] Q. Have you testified who prepared the bills of lading? A. We prepared them, presented them to Hansen, Tidemann & Dalton, and they finalize them by putting proper rubber stamps and dates and signatures, etc.

Q. Did you discuss this shipment with the American-Hawaiian Steamship Company at any time? A. No, at any time.

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Cross Examination by Mr. Dunn:

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[273] Q. I think you answered Mr. Bensel's question as to the strike situation by saying that regardless of your state of knowledge of the strike you would have acted exactly the same as you did here? A. Yes. May I explain that?

Q. Yes, go ahead. A. We had a contract for the S.S. Jane Swisshelm or A-1 substitute. From my knowledge

of the business, as long as the ship which Isbrandtsen gave us was a good ship we would have no legitimate reason to object to any vessel they might tender us and, furthermore, we could not know even from newspaper articles or what that a strike would definitely occur on September 2nd or 3rd or 4th. Strikes are threatened continuously. They never materialize or they are often deferred.

And another thing, this contract bears a clause to the effect that if the shipper is—

Q. Wait—

Mr. Bensel: You asked him.

The Court: I don't want witnesses interrupted, [274] and I don't want talk between counsel. The witness will finish his answer.

A. This contract bears a clause to the effect that a shipper is responsible for demurrage, which means if the ship is unduly delayed, caused by a shipper's fault, he would be responsible. Therefore, if I, surmising on a basis of news reports or any other information which I might have that a strike was going to occur on September 3rd, and if I took steps on August 25th or August 15th or any other day to prevent that ship from loading and if I guessed wrong, I would have liabled my shipper for suit by Isbrandtsen Steamship Company. They could hold our shipper responsible for demurrage for all of the time the ship was delayed and very possibly for dead freight if I didn't let the cargo get loaded at all, and that was $32,000 of freight alone in that shipment, aside from any demurrage that might accrue.

So as I see it I had no choice in the matter.

Q. Thank you for your explanation. Do I take it also as your testimony that you never inquired anything about the ownership of this vessel? A. Of the Hawaiian?

Q. Yes. [275] A. That is correct.

Defendant Colorado's Witness, Frederick R. Becker, Jr., Cross

Q. And that from your experience in the shipping industry you are not familiar with names of the vessels or with the vessels operating under particular lines ordinarily so that this would suggest anything to you? A. May I say that many ships bear similar names and exactly the same names, and we could, by referring to Lloyd's determine if there were two or three ships named Hawaiian, but unless we inquired specifically of the agent we would have no way of knowing which S.S. Hawaiian was being tendered us and who owned it.

Q. So you were not concerned with what type charter existed here? A. Between American-Hawaiian and Isbrandtsen?

Q. Yes. A. No, that was none of my business.

Q. And you were not concerned originally as to whether the Jane G. Swisshelm was in a position to make this voyage or not as long as she was named in the affreightment contract? A. We were concerned, but, as I said before, we try to deal with reputable people and we could not [276] possibly try to trace movements of ships throughout the world and expect to be able to pinpoint them down in their whole rotation and when they are going to get places. We have to depend upon the people we do business with and our main concern is to try to do business with people who in our opinion are reliable and honest and trustworthy.

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[277] Q. I think you stated in New Orleans that you knew all vessels are unionized 100 per cent, all American vessels; is that so? A. Yes.

Q. You assumed, of course, that that applied to the S.S. Hawaiian as an American vessel? A. I gave it no thought whatever. It is a foregone conclusion.

Q. Was it also part of your knowledge, if it was, that when a union strikes on a vessel all the others [278] strike

simultaneously with respect to that vessel and refuse to pass picket lines? A. I don't quite understand your question, sir.

Q. I will rephrase it. Were you aware, if you were—and correct me if I am wrong—that the strike of any operating personnel on that vessel accompanied by the picketing that goes with a strike would tie up the vessel at least because of the refusal of the other unions to cross the picket line? A. That is customary. I don't know whether it is 100 per cent correct. In most cases unions respect other picket lines.

Q. And were you aware that a vessel is unable to sail if any part of its operating personnel is missing? A. Yes, certainly.

Q. Were you concerned with this cargo leaving port, Mr. Becker? A. Was I concerned with it leaving port?

Q. Yes. Was that any of your concern? A. My responsibility in all cases is to get my cargo delivered, get it loaded, have my documents properly prepared and presented in accordance with my shipper's instructions. Beyond that I never know, unless I make specific inquiry when a shipper may ask me, when [279] a vessel sails, what the scope of its voyage may be unless of course, they incorporate it in the bill of lading when they issue it to us.

Q. Do you conceive your duties as constituting the obtaining of a bill of lading? A. Well, that is my primary duty. That is my final duty. Everything else is just to build up to that, because a shipper—the whole transaction hinges around the ocean bill of lading.

Q. And in this case did anybody in Colorado Shipping or Colorado Fuel give you any special instructions concerning seeing that this cargo left port? A. No.

Q. Did they give you any instructions concerning your handling of this cargo because of the existence or the threatened existence of any strike? A. No.

Defendant Colorado's Witness, Frederick R. Becker, Jr., Cross

Q. Do you follow me. In other words, did they say anything to you about taking any particular course of action on account of a strike? A. No, at no time was any discussion of a strike ever brought into this transaction until after the strike actually occurred.

[280] Q. I think you said you knew what a time charter implied with respect to the operation of a vessel. A. A time charter?

Q. Yes. A. Yes.

Q. To simplify that, I mean with respect to who employs the crew and the captain. A. Yes. Generally under a time charter the owner of a ship furnishes the crew, the fuel and so forth for the voyage and turns the ship over at a given point as required in the charter and it has to be turned back before the expiration of a specified period.

Q. And you knew that at the time we are talking about in 1948, did you not? A. I had that knowledge of what a time charter required, yes, but I did not know what type of charter was made between American-Hawaiian and Isbrandtsen on this transaction.

Q. Yes, I think you told us you did not inquire into that and did not make any inquiries about the ownership of the vessel. A. That's right.

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[281] Q. But you knew there was strike talk in the wind and in the papers, did you not? A. Yes.

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[282] Q. Take this case: you were dealing with Isbrandtsen? A. Correct.

Q. Did that mean to you that Isbrandtsen was going to be the operator and navigator of the SS Hawaiian? [283] A. No, sir, it did not necessarily mean that.

Defendant Colorado's Witness, Frederick R. Becker, Jr., Re-cross

The Court: Operating and navigating are two different things.

Mr. Dunn: I am sorry, Judge.

The Court: The master navigates.

By Mr. Dunn:

Q. So when you say you had no reason to wonder whether this strike you read about was going to affect this vessel, are you basing that on the fact that you did not know that American-Hawaiian was the owner of this vessel? A. I could base it on that fact, plus the fact that I did not know what type of charter was involved.

* * * * * * *

[290] *Re-cross Examination by Mr. Dunn:*

Q. Now, Mr. Becker, you say you did not know one way or the other whether there was a strike in existence at the time that you got the bills of lading, is that right?

Mr. Bensel: We have been over that, your Honor, two or three times and I think it is repetitious.

The Court: I suppose a lot of this is repetitious as I look over this deposition, but a little more repetition won't hurt.

Mr. Bensel: All right.

A. Mr. Dunn, I have already stated that I do not recall the exact time we learned of the strike, nor do I recall the exact time that we received the bills of lading. All I can state is it was September 3rd.

Q. Well, then, is it quite possible that the strike was in existence on September 2nd without you knowing about it? [291] A. If you mean is it possible that the union chiefs had called the strike without my knowing it—

Q. Yes. A. —yes, that could have happened.

Defendant Colorado's Witness, Frederick R. Becker, Jr., Re-cross

Q. Is it possible that the crew of this vessel had walked off the ship without you knowing about it? A. It would be possible. I do not handle the ship, sir. I would like to add something there, if I may. Even if a strike—

Q. Don't add anything, please. Your counsel can ask you anything he wants.

The Court: Well, to save time, what do you want to add?

The Witness: Well, this, sir: If a strike was called by a union chief on September 2nd, it does not necessarily mean that the crew, as far away removed as New Orleans, would immediately walk off the ship.

By Mr. Dunn:

Q. That is quite true, but suppose they did, did you know about it? A. No.

Q. Can you tell us whether they did? A. No, I cannot tell you that.

* * * * * * *

Q. In other words, you did not know then whether or not the crew had walked off or had not walked off on September 2nd, is that correct? A. Yes, that is correct.

* * * * * * *

Plaintiffs' Exhibit 4 (In Part).

(Becker Deposition.)

[174] FREDERICK BECKER, JR., called by and on behalf of the plaintiffs, being first duly sworn by a Notary Public, was examined and testified as follows:

Direct Examination by Mr. Dunn:

* * * * * * *

[178] Q. How do you go about learning what vessels are available on which you might engage cargo space, if you should so desire? A. When we get an inquiry from a shipper for a given cargo in a given direction, we know from experience which agents generally operate in that direction and we contact their offices to ascertain which vessels they have, when they will be receiving, when they are scheduled to sail and the ports of call to which they are going.

Q. Do you do that with respect to each specific piece of business that a shipper gives you? A. Unless there is instructed routing by the particular shipper, we always check to see which vessel is in the most suitable condition, taking into consideration the particular shipper's contract requirements with the various steamship requirements so forth that are operating.

Q. In your experience as agent for Colorado, has it customarily been specified to you what ship to use? A. In the—

Q. Or otherwise in the case— [179] A. If you are referring to their shipments of steel, in most cases they do. This particular shipment of caustic, as I recall it, was a question of trying to find a boat.

Q. In trying to find a boat, what did you do? A. On this particular shipment?

Q. Yes. A. Well, as I recall it, we contacted the regular steamship companies operating in the conference to India, which, I believe, at the time, were Isthmian Steamship Company and the Kerr Steamship Company, agents for the Silver Java Line.

Plaintiffs' Exhibit 4 (In Part)

Q. Did you make any shipping commitments with Isthmian and/or Kerr? A. No, they had no space at the time for caustic soda.

Q. What did you do then? A. To the best of my memory, we then canvassed the market to see what other vessels may be available with other operators of vessels, whether in or out of the conference.

Q. What did you find with respect to Isbrandtsen vessels? A. Well, as I recall it at the time, we contacted Hansen & Tidemann, who was also interested in any large parcel in any direction, as a nucleus of cargo to submit to their principals, Isbrandtsen Steamship Company, and eventually, if my memory is correct and which my file, I am sure, will bear me out, we were offered a booking [180] or a vessel by the Isbrandtsen Steamship Company through their agent here.

* * * * * * * *

[208] Q. You were referring to the newspaper when you were interrupted in your answer. Did you gain any knowledge from newspapers concerning the pending strike, as you called it? A. Again, I can only say, if it was printed in the papers as an average person reading the daily news I would know about it, but to state when it was first printed in the papers, if it was predicted ahead of time or when it was first printed, if and when it actually happened, I do not recall.

Q. I take it you also listen to news broadcasts? A. Occasionally, when time permits. At that particular time we had very little time to listen to anything. We were working night and day.

Q. Did you have a radio in your home? A. Yes, we have radios in our home.

Q. Did you have a car with a radio in it? A. Yes, I had a car with a radio at that time.

Mr. Dunn: You may inquire.

Plaintiffs' Exhibit 4 (In Part)

[209] *Cross Examination by Mr. Bensel:*

Q. Mr. Becker, have you any independent recollection of having read a newspaper article about a pending strike prior to October 3, 1948? A. No, sir; I cannot recall whether I first read it or if I read it.

Q. You have no recollection you ever read it in any newspaper concerning a threatened strike or a pending strike? A. That is correct.

* * * * * * * *

[236] Mr. Tillinghast:

Q. If there were an event such as a strike or a labor stoppage, which might prevent the loading of your client's cargo on a ship, on which you have booked space, that would be serious enough for your attention, would it not? A. Yes, certainly.

Q. And you make it a point to keep informed of such situations. Isn't that a fact? A. To the best of our ability; yes.

Q. And you would know of an impediment such as the strike in 1948, wouldn't you? A. Not necessarily. We do not deal with, and in some cases shippers and port authorities—everybody exerts every effort to settle the thing and keep it quiet, and not alarm shippers unnecessarily. It could mean diversion of cargo from a port needlessly.

Q. Yes, I can understand that, but my point is that you keep yourself informed of such situations, don't you, when they come to your attention? A. When they come to our attention, very definitely we do. If we are aware of an impending strike of stevedores, [237] longshoremen, car unloaders, ship crews, naturally we do because when we are quite certain it is going to happen, we notify as many as possible of our shippers.

Mr. Tillinghast: I have no more questions.

* * * * * *

Plaintiffs' Exhibit 4 (In Part)

(New Orleans Press Reports, in Part)

TIMES-PICAYUNE, TUESDAY, JUNE 15, 1948—Page 1

Column Head: COURT BANS PUTS OFF SHIP STRIKE

Sub-Head: Three Orders cover all Coasts for 80-Day Wait

(The AP)

New York, June 1—The threatened nationwide maritime strike appeared off for at least 80-days today after the Federal Government got three injunctions against it.

The three orders were signed by Federal judges in the East and Gulf Coasts, West Coast and Great Lakes phases of the dispute.

That automatically brought into play the 80-day cooling-off period provided by the Taft-Hartley Law, federal officials said.

Late today officers of the C.I.O. National Maritime Union, largest of the seven unions involved, sent out instructions to all members directing that the injunction be obeyed.

. . . . . .

Vote Not Nullified

"Our compliance with this restraining order does not nullify our strike vote," the message said. "Its application is delayed only until the union is free to move." The injunctions were signed by Judge John W. Clancy in New York (East and Gulf Coasts), Judge George B. Harris in San Francisco (West Coast) and Judge Emerich B. Freed in Cleveland (Great Lakes).

In San Francisco, five maritime unions denounced the temporary restraining order as a "straight out strike breaking attempt for which President Truman must take full and odious responsibility."

Plaintiffs' Exhibit 4 (In Part)

Although the unions involved did not immediately rescind strike instructions to their memberships, there were other official indications the Court order would be obeyed.

Hearing Monday

* * * * * * *

The three unions named in Judge Clancy's order are the N.M.U., the C.I.O. Marine Engineers' Beneficial assn. and the C.I.O. American Radio Association.

Other unions involved in the dispute are the C.I.O. International Longshoremen's and Warehousemen's Union, the C.I.O. Marine Cooks and Stewards, the A.F.L. International Brotherhood of Electrical Workers and the Firemen and Oilers, an independent group. These four operate on the West Coast, as does M.E.B.A.

N.M.U. and M.E.B.A. negotiators met with representatives of the ship owners at bargaining sessions here today.

Says Ship Lines' Acts Aid Soviet's Program

Steamship operators are lending aid and comfort to the Soviet union in calling for an end to union hiring halls for seamen, Harry Alexander, acting port agent at New Orleans for the National Maritime Union, said Monday.

Alexander said, "One of the major projects of the communists is to sabotage the Marshall Plan and they know that a maritime strike will do just this. The operators also want a strike to test their strength against the union in an attempt to break the union."

He said that an end to the hiring halls will cause "much confusion" in the shipping industry. "The men will

Plaintiffs' Exhibit 4 (In Part)

spend their time on the beach (ashore) going from shipping company to shipping company looking for berths (jobs)," he said.

* * * * * * * *

NEW ORLEANS ITEM, THURSDAY, JUNE 24, 1948—Page 2

Column Head: JUDGES HALT NATIONWIDE SHIP STRIKE

New York (UP)—The actions of federal judges in New York and San Francisco today headed off a nationwide maritime strike by 100,000 union members scheduled for midnight tonight.

An 80-day injunction against the strike was issued here today by U. S. District Judge John Clancy. The no-strike order was against the National Maritime Union, the Marine Engineers' Beneficial Assn., and the American Radio Assn., all CIO unions.

In San Francisco, U. S. District Judge George B. Harris granted the government a 10-day extension of a temporary restraining order against other unions threatening to strike.

A similar restraining order was issued yesterday in Cleveland preventing a threatened strike on the Great Lakes at least until July 2.

President's Orders

President Truman has ordered the government attorneys to seek the injunction against the strike under provisions of the T-H law.

Plaintiffs' Exhibit 4 (In Part)

In handing down his decision, Judge Clancy ruled that a Maritime strike would endanger national safety and health.

The injunction provided that the "status quo be maintained in the use of union hiring halls to furnish workers for the ship operators." That is one of the main issues involved in negotiations between the unions and the ship owners.

Issue in Dispute

Joseph Curran, head of the NMU, said that the injunction meant only that the strike would be delayed 80 days and that the union men would go out at that time if the union hiring hall issue has not been permanently settled.

Employers have insisted that in order to comply with the T-H law the hiring hall must be operated by an impartial dispatcher instead of by union men as is done at present.

Others among the seven unions involved in the threatened strike were the International Longshoremen's and Warehousemen's Union (CIO), the Maritime Cooks and Stewards Union (CIO), the Electrical Workers (AFL), and the Marine Firemen's Union (Ind.).

NEW ORLEANS STATES, MONDAY, AUGUST 16, 1948 —Page 5

Column Head: No Truce Seen in Maritime Fight in West

(The AP)

Washington, August 16—A presidential fact-finding board held out little hope for settlement of a West Coast maritime dispute.

Plaintiffs' Exhibit 4 (In Part)

But the board described prospects for settlement on the East coast as "very good."

Seven unions are involved. The most important are the CIO Longshoremen, headed by Harry Bridges, and the CIO National Maritime Union, headed by Joseph Curran.

The board said in a report filed with the White House late Saturday that West coast negotiations "have been fruitful only in charges of bad faith and intensification of distrust and bad feeling."

On the East Coast, the board said, "the parties appear to have made earnest and effective efforts to reach agreement."

"Remaining differences are quite narrow, with good prospect for a settlement in the near future," the report said.

On the Great Lakes where employers do not bargain jointly, some already have reached settlements, the Board reported.

The Board made its report to President Truman under the national emergency provision of the T-H Act. It made no recommendations and merely related the situation. It said the dispute over methods of hiring still is the big barrier to a general agreement.

The justice department obtained injunctions June 14 in New York, San Francisco, and Cleveland, blocking an all coast strike of seamen and dock workers.

The National Labor Relations Board now must conduct elections to determine whether the workers wish to accept the employers' final offers. The elections must be finished within 15 days.

If the workers vote against accepting the final offers, the law provides for lifting of the injunctions. This would leave the workers free to strike.

Plaintiffs' Exhibit 4 (In Part)

NEW ORLEANS ITEM, TUESDAY, AUGUST 17, 1948
—Page 1

Column Head: SEAMEN'S HIRING HALL ISSUE AGAIN IN OPEN

By: John Collier

Issues in the maritime dispute, which may result in a nationwide shipping strike September 2 were further clouded today.

The union hiring hall issue, a main stumbling block believed eliminated by an agreement weeks ago, was thrown wide open today by a ruling of a National Labor Relations Board Examiner.

The examiner, Wallace Royston, accused two CIO maritime unions of violating the Taft-Hartley law by demanding that shipping firms make exclusive use of union hiring halls for employees.

He charged further that the unions had refused to negotiate the matter in good faith. His recommendations must now be considered by a five-man National Labor Relations Board board, and ultimately by the courts.

The examiner's charges were denied by New Orleans officials of the National Maritime Union, one of the two involved.

Several thousand NMU seamen were here awaiting the outcome of the negotiations, being conducted by representatives in New York.

The ABCs of the situation, and the impact of the examiner's charges are as follows:

Some six unions, including the NMU, are involved in the dispute. They are under court orders not to strike, invoked under the Taft-Hartley Law.

The orders expire September 2.

Plaintiffs' Exhibit 4 (In Part)

The hiring hall at first was the main issue of all these disputes—whether the T-H law made illegal the old agreement under which shipping companies did their hiring through union halls.

The issue is still a "hot potato" on the West coast, especially for Harry Bridges and his left-wing International Longshoremen and Warehousemen's Union.

But on the East and Gulf coasts it was believed settled so far as it—the NMU was concerned.

This was because the union and operators had agreed to continue present hiring arrangements pending "judicial determination of their legality."

Believing that the hiring hall issue had been eliminated as a danger point, union officials turned their attention to collateral issues such as wages, retroactivity and wage review.

But the examiner's ruling brought the hiring hall back into focus.

Must Negotiate

Royston did not rule that hiring halls themselves violate the labor law. But he said the unions must negotiate the issue in "good faith" with the employers. That, he said, they had "refused to do."

This was denied in New Orleans by John McDougall, NMU port agent.

The NMU and operators, he said, had negotiated the matter with operators to such an extent that "we had a written agreement."

Both sides agreed to maintain the status quo on hiring halls unless the courts at some future date should rule otherwise. In that event we would abide by the decision and rewrite the agreement.

"The hiring halls do not constitute a closed shop," he said.

Plaintiffs' Exhibit 4 (In Part)

Until today the NMU had turned most of its attention to the wage issue. AFL seamen received a pay boost last week and NMU officials said their people were not offered as much. The NMU yesterday in New York demanded wage parity with the AFL (Seafarers' International Union).

NEW ORLEANS ITEM, WEDNESDAY, AUGUST 18, 1948—Page 1

Column Head: SHIPPING STRIKE IS AVOIDED

New York (UP)—The U. S. Conciliation Service announced today that an agreement had been reached between the National Maritime Union (CIO) and Atlantic and Gulf Coast shipping operators, settling a strike threatened for September 2.

The agreement reached after an 11 hour session between representatives of 42 shipping companies and the union, called for wage increases of $25 a month for boatswains and $12.50 for other personnel. The raise is retroactive to July 16.

Retain Hiring Hall.

The terms of the agreement were the same as those reached last week between nine Atlantic Coast operators and the Seafarers' International Union (AFL).

The agreement retained the disputed hiring hall which had been opposed previously by the operators and declared illegal on Monday in a report of a National Labor Relations Board examiner.

Plaintiffs' Exhibit 4 (In Part)

The new contract which is expected to be signed in a "week or two," as soon as the NMUs 60,000 members have ratified the agreement, will be effective until July 15, 1949.

Contract Benefits.

The union's contract with the shippers expired June 15. A threatened strike was postponed, when the government obtained injunctions prohibiting strikes and lockouts until September 2, under provisions of the T-H Act.

Other union benefits under the proposed new contract were: Penicillin to be included in ship's medical stores and distributed free when needed; shore sick pay raised from $3.50 to $6.00 per day; and overtime pay for Monday's work when a holiday falls on Sunday.

NEW ORLEANS STATES, SATURDAY, AUGUST 28, 1948—Page 2

Column Head: SHIP RADIO MEN GET 6PC HIKE

(The AP)

New York, August 28—Some 2,000 ship radio operators who threatened to strike September 2 have been granted a six per cent increase in their basic wage.

The agreement was reached yesterday by officials of the CIO American Radio Association and East and Gulf Coast shipping companies.

Plaintiffs' Exhibit 4 (In Part)

NEW ORLEANS STATES, MONDAY, AUGUST 30, 1948—Page 28

Column Head: WATERFRONT STRIKE NEARS IN WEST COAST SNARL.

(The Associated Press)

San Francisco, August 30—Pacific coast maritime contract negotiations wrangled on today in an atmosphere of more than usual antagonism.

The waterfront picture became much more difficult late yesterday when longshore union spokesmen turned the latest employer proposals "completely unacceptable."

They reaffirmed that their coastwise strike called for next Thursday, when an 80-day government injunction expires, would come off on schedule.

Still Optimistic.

But Robert Mayer, spokesman for the employers, still maintained the outlook was "optimistic."

Harry Bridges' CIO Longshore Union, thru Spokesman Morris Watson, said the employers had not offered to continue the present form of hiring hall—the key issue in talks—and union security.

The employers emphatically denied this. Frank Foisie, president of the employer group, said the union statement was "pure hokum, intended only for confusion."

"On the hiring hall, we made the identical concession that was made in the East last week which prevented a strike," he added.

Plaintiffs' Exhibit 4 (In Part)

Disagree on Raise.

Foisie was speaking of the employer offer, accepted by Eastern maritime unions, to leave the hiring hall as presently set up pending court determination of its legality under the T-H law.

The hiring hall now has a union-hired dispatcher; the employers say the dispatcher, under the law, must be neutral.

Foisie said the employers' offer of an 8-cent wage hike "puts longshoremen 15 per cent ahead of the cost of living increase based on labor department figures." The union called 8-cents inadequate—far below increases granted by other major employers.

New Orleans States, Tuesday, August 31, 1948—Page 24

Column Head: Pacific Coast Dock Strike Still Threat

(The AP)

San Francisco, August 31—An agreement on the thorny hiring hall issue appeared in sight today but a labor peace hung precariously as the 12:01 A. M. Thursday strike deadline neared.

Waterfront employers and the CIO International Longshoremen's Union still were far apart on the wage question among others.

The employers yesterday reported their offer of 2-cents to 10-cents an hour straight time and 15-cents overtime in an effort to forestall the threatened walkout but the union insisted on 18-cents and 27-cents.

Plaintiffs' Exhibit 4 (In Part)

No Wage Reviews.

An ILWU statement said the employer offer did not provide for retroactivity and did not contain "the usual periodical wage reviews."

On the hiring hall issue, the ILWU said "an agreement in principal was reached."

"The employers are considering language offered by the union which, if accepted, will remove the hiring hall as a strike issue," it explained.

Indicates "No Change."

But an employer spokesman indicated no change in the employers' attitude that the hiring hall be left status quo pending court determination of its legality under the T-H Law. This was the basis of this month's East Coast maritime settlement.

What the government will do when the 80-day federal "cooling-off" injunction expires remained a question. Jesse Rosenberg, special department of justice attorney said he had asked Washington for instructions on lifting the injunction.

Injunction or no, the longshoremen announced their decision to stop work Thursday still stands.

Plaintiffs' Exhibit 4 (In Part)

New Orleans States, Wednesday, September 1, 1948—Page 3 o

Column Head: Rail Embargo Due in Shipping Strike

(The AP)

Washington, September 1—The railroads today prepared to clamp an embargo on virtually all freight destined for shipment from West Coast ports if a maritime work stoppage develops there tomorrow as threatened.

Plans for the embargo were announced by Arthur H. Gass, Chairman of the Car Service Division of the Association of Railroads.

Gass said the embargo is a protective measure to prevent freight cars being tied up at western ports in case of a maritime work stoppage. If the work stoppage does not occur, the embargo will be withdrawn at once, he said.

Some Freight Exempt.

Gass said these four classes of freight are exempt from the embargo:

Green soy beans, flax seed, malt and rice in bulk when they are covered by permits issued by elevator operators where the freight is to be unloaded.

Petroleum or petroleum products in tank cars when they are to be unloaded prior to overseas shipment.

Freight consigned to the Army, Navy, Air Force, Marine Corps or Coast Guard. Freight airship space is available and for which special permits have been issued by West coast representatives of the Car Service Division of the AAR.

Plaintiffs' Exhibit 4 (In Part)

Negotiators Huddle.

In San Francisco negotiators were called together in an 11th-hour hope of averting a tieup of Pacific coast shipping at midnight tonight.

Prospects of reaching a settlement between the employers and five unions in time to avoid a work stoppage appeared slim. The unions have agreed that "all or none" will sign, and even with an agreement the mechanics of adjusting all contracts before the walkout deadline would require time.

New Orleans States, Thursday, September 2, 1948—Page 1

Headlines: Strikes Threaten To Cut Supplies To Big Cities

Column Head: Two Walkouts Block East, West Coasts

—Bulletin—

(The AP)

Washington—President Truman said today he is powerless to take further action in the West coast maritime strike except through negotiation.

He made this remark at his news conference when asked what action he contemplates in that case and in the New York strike.

Mr. Truman did not reply as to the New York strike but he said he has taken every possible action under the law in the West coast case.

Plaintiffs' Exhibit 4 (In Part)

(The AP)—Two major work stoppages on the East and West coasts today threatened to cut off supplies to a large segment of the nation's population.

Freight shipments into New York City and Pacific coast ports from Seattle to San Diego were halted by rail embargoes as the work stoppages went into effect.

Involved in the New York dispute are some 10,000 AFL truck drivers who quit work yesterday after rejecting a proposed wage agreement. On the West coast, 16,000 CIO longshoremen and seafarers stayed away from their jobs and prepared to set up picket lines in a dispute over wages and a hiring hall issue.

New Orleans Item, September 2, 1948—Page 1

Column Head: ILWU Calls For Walkout

San Francisco (UP)—CIO longshoremen and waterfront employers broke off negotiations tonight and dock worker chief Harry Bridges announced the Pacific Coast strike of 30,000 maritime workers "is on."

The end of the day's long discussions came suddenly, two hours after negotiators for the CIO International Longshoremen's and Warehousemen's Union and the waterfront employer's association went into a joint night session at 8:30 P. M.

"Employers slapped down this offer on a take it or leave it basis," Bridges said, "It is left. The men will go out tomorrow morning at 10:14 A. M."

Plaintiffs' Exhibit 4 (In Part)

Bridges Confident.

The collapse of the discussions with the ILWU made a coast wide tieup of all ports at 10:15 A. M. tomorrow a virtual certainty. Unless the federal government finds some way of extending an injunction that expires at that time, the restraint that has held the 12,000 longshoremen and 16,000 allied seafaring workers from a walkout for 80-days under the T-H Act will have been lifted.

"I'm sure the government won't step in," Bridges said as he emerged from the meeting.

All of the five west coast unions threatening walkout are mutually pledged to strike unless each has signed a satisfactory agreement.

A strike meant an immediate railroad embargo of all shipments destined for ocean transfer through ports along the 1800-mile Pacific Coast.

550 Ships Affected.

It meant a tieup of some 550 ships, 375 of them American flag vessels—unless some of them could escape the blockade that might begin tonight at midnight when marine firemen and engineers (Ind.) have scheduled the beginning of the picketing.

The Pacific American Steamship Association calculates that the walkout will halt movement of an estimated $6 million of war production every month and affect the jobs of 530,000 wage earners in freight trade alone, plus the 30,000 longshoremen, and seafarers and allied trades and thousands of other workers.

Loss in wages for the seamen, cooks and stewards, longshoremen, engineers and marine firemen and radio operators alone was estimated at $10 million monthly by the PASA.

Defendant Colorado's Witness, Ward Wire, Direct

Supply lines to Alaska, Hawaii and Pacific mandate islands and the Japanese occupation forces would be affected, most of them virtually paralyzed.

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[292]

Trial Minutes.

(Testimony of Ward Wire.)

WARD WIRE, called as a witness in behalf of the defendant Colorado Fuel and Iron Corporation, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bensel:

Q. Mr. Wire, where do you reside? [293] A. Denver, Colorado.

Q. Are you connected with Colorado Fuel and Iron? A. Yes, sir.

Q. In what position? A. General traffic manager.

Q. Where are you located? A. Denver.

. . . . . .

[294] Q. Prior to September 3, 1948, had you out there in Denver read or heard about a threatened maritime strike? A. We in our press, the papers there, we had two, touched quite lightly on all general strikes throughout the country. If it was a local one quite near Denver they were quite specific, but the general maritime strike out in the Gulf or the east coast or the west coast, they are pretty meager in their information, but I did read about it in a general way, yes.

. . . . . .

Defendant Colorado's Witness, Ward Wire, Cross

[295] Q. When did you first hear about a strike involving this shipment? A. September—late September 7th or September 8th.

• • • • • • •

[297] Q. Prior to September 3rd or September 7th did you know what kind of a crew was aboard the S.S. Hawaiian? A. I knew nothing about the crew or the charter or anything else. All I knew I had confirmed booking for a certain tonnage on the boat.

• • • • • • •

Cross Examination by Mr. Dunn:

[300] Q. I now ask you the question, did you know then whether the plaintiffs in this case, Badhwar and his company, had ordered any caustic soda from your company at the time you made that booking? A. No, sir.

Q. And you know now, having refreshed your recollection, that the plaintiffs had in fact not ordered any caustic soda from you nor ever negotiated about any such order until sometime after that booking that you made on July 29th? A. No, sir, I never knew anything about that.

Q. Do you know who was handling for your company the negotiation of these caustic soda contracts in India? A. Our export sales department here in New York City.

Q. Did you have any communications with them at the time as to orders for caustic soda? A. Not until they asked me to book a specific amount. The negotiations of sale—

Q. Well, were there sales or advance negotiations that they might have been conducting— A. No, I had no knowledge of their negotiations. I had knowledge only of what they asked me to book.

[301] Q. Did you ever hear of a man named Bartle? A. Yes, sir, I have.

Q. Did he act on this particular contract and in the negotiation thereof? A. To the extent he carried on some

negotiations to get the export permits only, that was his activity—the export permits that were required by the Government.

Q. And to send cables to India in connection with these negotiations? A. Mr. Bartle?

Q. Yes. A. I don't know.

Q. You don't know? A. No.

Q. Was Mr. Bartle's compensation dependent in any way upon the completion of this contract? A. I don't know.

Q. Who would know that fact in your company? A. Well, it could be several different officials that would know about it, the former president, vice president, the manager of the export department, a man who was then manager is no longer with us, but I would have no knowledge of matters of that kind.

Q. Did you know of your knowledge whether any export licenses had been issued or promised for this caustic on July 29th when you made the booking? [302] A. Well, I had to have the export licenses before I could authorize a shipment. I had export licenses for the tonnage involved, yes. We wouldn't let it leave our plant until we had that.

Q. And to your knowledge, was that license or the licenses held by Colorado Fuel and Oil Corporation exclusive licenses of that type then in existence in the United States? A. No, sir; all we know is that we had the license for the given amount of tonnage, and that's all I know about it.

Q. And that's all you knew in the Denver office? A. Yes, sir.

Q. So when you booked this caustic soda on the Jane G. Swisshelm of 1,000 tons you had no knowledge of what contract it was to be scheduled for, did you? A. The shipment?

Defendant Colorado's Witness, Ward Wire, Cross

Q. You had no knowledge of who the buyer was or what contract this caustic was supposed to fulfill? A. If I understand your question, I had no knowledge of who the consignee was when I booked tonnage for the precise time, and then later on I got the consignee's name, and then when it left our plant at Ladora, that's the first knowledge I had of [303] the consignee's name.

[310] Q. Is it true that whatever shipping arrangements you had to make in New Orleans for any shipments during that period and for a period of years prior thereto were handled though the Farrell people? A. Yes, all of our shipments that we made where [311] we designate the broker are handled through Farrell. We sell some goods in which they have their own broker that sell F.A.S. Gulf ports, and that is consigned to those brokers in that case, but that is very light.

Q. There is no question that whenever you had to make a shipment of New Orleans you handled the details thereof, the booking of the space and so on, through Mr. Becker and his associates? A. Yes, through his company, Farrell & Company, for many years.

[3]

Plaintiffs' Exhibit 6.

(Morgan Deposition.)

LOUIS B. MORGAN, residing at 10 W. Maple Drive, New Hyde Park, New York, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Dunn:

Q. Mr. Morgan, what is your present position with Colorado Fuel and Iron Corporation? A. My present position is that of export manager.

Q. How long have you been with Colorado Fuel? A. I would say about seventeen or eighteen years.

Q. What was your position with them in 1948? A. My position in 1948, prior to October 21, was that of administrative assistant.

Q. You were administrative assistant to whom, and in what department? A. The Export Department; and I was administrative assistant to the export manager.

Q. What was his name, please? A. Mr. Matt Rosse.

Q. Mr. Rosse is now deceased? A. That is correct.

Q. Speaking as of a period in 1947 and 1948, [4] let us say June, 1947 to September of 1948, how many offices did Colorado Fuel have in the United States, and where were they located? A. I believe I will have to refer to Mr. Knecht for that.

Mr. Bensel: You mean officers, or offices?

Mr. Dunn: Offices.

The Witness: Off the record.

(Discussion off the record.)

A. All I can say is that the general sales offices of the corporation are in New York and in Denver, Colorado. That is my understanding.

Plaintiffs' Exhibit 6

Q. Where are the executive offices of the corporation, speaking as of the period 1947, 1948? A. Well, I believe that they would be in New York and in Denver, Colorado —New York City and Denver, Colorado.

. . . . . .

[5] Q. Can you tell us the approximate number of personnel of all types employed by Colorado Fuel in that 1947, 1948 period? A. No, sir.

Q. Did it exceed a thousand? A. Yes.

Q. Did it exceed five thousand? A. Today it does. I presume at that time it did.

Mr. Bensel: The number of employees in 1947, according to the annual report of the [6] company, was 14,666 and in 1948, it was 15,226.

. . . . . .

[12] Q. Did you have anything whatever to do with a caustic soda sale to an Indian firm known as Mulkraj Brothers and Badhwar in the summer of 1948? A. I didn't have anything to do with the actual sale of it.

Q. What part of it did you work on, if any? A. To the best of my recollection, I was brought into [13] the picture in about late August, 1948, just prior to Matt Rosse, the export manager, going on vacation, and, in the interest of reviewing the letter of credit, taking care of other matters pertaining to that transaction, I took over for the two weeks that he was away as a clearing house, you might say, as a kind of intermediary.

Q. Did you then familiarize yourself with the details of the matter? A. I familiarized myself with the details of the sales based on the information which was given to me at that time.

Q. Was there a file which you reviewed? A. There were a few cablegrams, exchange of cablegrams. There was an application for export license. There was a letter of

Plaintiffs' Exhibit 6

credit. There is where I got into the picture. There was plenty after that, of course, but that was the beginning.

Q. Can you state the date at which you got into the picture, as you tell us? A. Well, in reviewing my files, it would appear that I got into it after August 20, 1948.

Q. After August 20 and prior to what date? In other words, state the date as nearly as you can. [14] A. The 25th.

Q. Sometime between the 20th and the 25th; is that your best recollection? A. That is right.

. . . . . .

[16] Q. Did you have a Mr. Bartle with the company at [17] that time? A. Mr. Bartle—I don't recall too much the extent how Mr. Bartle fitted into the picture, but Mr. Bartle was, I believe, on a commission basis of some sort. I am not familiar with that.

Q. Who was in charge of your Washington office on Eye Street? A. I do not recollect, at that time.

Q. Did you note from the file in this case that various cables and other communications were signed by Mr. Bartle? A. Yes, sir.

Q. Was he in charge of the Washington office of the company? A. To my knowledge, he was not in charge of the Washington office.

Mr. Bensel: You are assuming that we have a Washington office.

Mr. Dunn: Off the record.

(Discussion off the record.)

The Witness: I would like to correct the assumption I made that the Washington office was in existence at the time. Actually, I do not know when the Washington office was established.

[18] Q. Does the 1616 Eye Street, Washington, address, contained in many of the cables and documents in this case,

refer to some address of Mr. Bartle rather than an office of the corporation itself? A. Frankly, I don't know what that means, other than it is an address where Bartle can be reached, perhaps.

Q. Did you have anything to do with the request to change a letter of credit established by plaintiffs from Bartle's name to the name of the corporation? A. Yes, I think I did.

Q. What was your reason for so doing that? A. The letter of credit was improperly made out. It was not in a form in which I could accept it.

Q. Couldn't you have used it through the cooperation of Mr. Bartle, in whose name it was made out? A. I might have been able to, but I wouldn't have.

Q. Did anybody instruct you to get it changed, or was that your decision? A. I believe that was my decision, or my recommendation.

Q. Who was arranging the loading in New Orleans on this shipment? A. The matter pertaining to shipping would be handled [19] by our traffic department in Denver with a freight forwarder in New Orleans.

Q. Do you know who that freight forwarder was? A. Yes, Farrell Shipping Company.

. . . . . .

Q. Did your export department ever have occasion to communicate with Farrell Shipping Company about any shipments, prior to the Badhwar shipment? A. Offhand, I would say no.

Q. Did you communicate with them at all during [20] the Badhwar transaction? A. I believe that a phone call was made during part of that transaction.

Q. Tell us about that phone call. A. That is a little bit hazy. I believe it had to do with loading or remarking some five hundred tons of soda; caustic soda.

Q. Did you have the conversation? A. Yes.

. . . . . .

Plaintiffs' Exhibit 6

[23] Q. Who dispatched or ordered the original cables negotiating a contract with Badhwar or Mulkraj? A. Well, that transpired before I got into the picture.

Q. Did you learn at any time who was responsible for sending those cables? A. Well, I believe Bartle, and I think the Bank was involved in there—the National City Bank, that would be.

[24] Q. Who gave instructions to Bartle and to the National City Bank to negotiate this contract? A. I don't know.

. . . . . .

[27] Q. At the time you took over the file, between August 20 and 25, as you have testified, were you given any instructions to ascertain the sailing date of the vessel in which this shipment was to proceed? A. To my knowledge, I was not, at that time.

. . . . . .

[29] Q. Does that include the whole period from June [30] of 1948 to December of 1948? A. To the best of my knowledge. I don't know whether there was a strike here in New York or not, during that period June to December, without going back and looking it up, but to my knowledge, I don't recall.

Q. Do you mean by that answer that you might have known or might not have known? A. I mean by that answer I might have known about a possible threatened strike in New York, between that period, or that there was actually one in effect. If it was in effect, it would have been pretty common knowledge in New York here. I knew of no strike or threat of strike on the West Coast, nor the Gulf.

Q. Did the export sales transactions arranged by your export department generally involve shipments through Gulf ports? A. Not necessarily. We had quite a few shipments through the East Coast ports.

Plaintiffs' Exhibit 6

Q. Did you have any through the West Coast ports? A. The company probably had some through the West Coast ports of which I was not, or my predecessor was not, concerned with, that is, to my knowledge he was not concerned with.

• • • • • • • •

[38] Q. Where were the various offices of Colorado Fuel and Iron Corporation located in 1948?

Mr. Bensel: The corporation had sales offices and/or warehouses in a number of cities in the East and the Middle West. Do you want me to enumerate all those? Then we have them in the Mid-West and the Far West.

Mr. Dunn: Yes, I will have to ask for a list of the cities.

Mr. Bensel: The Wickwire Steel Division had offices or warehouses in Boston, Buffalo, [39] Chattanooga, Tennessee; Chicago, Illinois; Clinton, Massachusetts; Detroit, Michigan; Emlenton, Pennsylvania; Mount Wolf, Pennsylvania; New York, N. Y.; Newport News, Virginia; Palmer, Massachusetts; Philadelphia, Pennsylvania; and Worcester, Massachusetts.

Colorado Fuel and Iron Mid-Continental Sales Division had offices or warehouses in Abilene, Texas; Albuquerque, New Mexico; Amarillo, Texas, Butte, Montana; Denver, Colorado;; El Paso, Texas; Fort Worth, Texas; Houston, Texas; Lincoln, Nebraska; Oklahoma City, Oklahoma; Phoenix, Arizona; Pueblo, Colorado; Salt Lake City, Utah; Tulsa, Oklahoma; Witchita, Kansas.

California Wire Cloth Corporation, West Coast Sales Division, had offices or warehouses at Los Angeles, California; Oakland, California; Portland;

Plaintiffs' Exhibit 6

Oregon; San Francisco, California; Seattle, Washington; Spokane, Washington.

Mr. Dunn: The organizations you have mentioned were all divisions of Colorado Fuel and Iron Corporation; is that not correct?

Mr. Bensel: Except that the California Wire Cloth Corporation is a subsidiary corporation.

[40] Mr. Dunn: Wholly owned?

Mr. Bensel: I think it is.

Mr. Dunn: I merely want somebody to tell me whether it was operated as an integral part of the Colorado Fuel and Iron Corporation.

Mr. Bensel: Frankly, I don't know enough about it to answer that question. Maybe the witness does.

The Witness: I don't, either.

Mr. Dunn: Does it file a consolidated annual report with Colorado Fuel and Iron and are its offices and operations referred to therein together with the parent corporation?

Mr. Bensel: Yes.

Mr. Dunn: Off the record.

(Discussion off the record.)

Cross Examination by Mr. Tillinghast:

Q. The Colorado Fuel and Iron Corporation and its affiliates and its subsidiaries manufactures a number of different commodities, does it not, Mr. Morgan? A. Yes, sir, it does.

Q. Are those commodities in general manufactured for export as well as domestic consumption and sales? [41] A. I have only been concerned with the sale of steel products within the company, with the exception of one

or two instances, and this is one of them. Most all the material made is sold at one time or another in the export market, yes.

Q. I am not quite clear as to the function of your particular department. Is it an export sales department, or isn't there any difference between those two terms? A. Well, I would say that it is an export sales department whose purpose is to sell, whose purpose and responsibility is to sell the steel products of the corporation. I have no responsibility on any other product at this time or in the past.

Q. Do I understand, then, that this export sales department which you presently head is concerned only with the sale for export of steel with the exception, say, of caustic soda, occasionally? A. Well, the only occasion was this particular case.

. . . . . .

[43] Q. Did you know, or was your department aware, that India was a principal market for caustic soda? A. I didn't know what caustic soda was until August 20, something or other.

Q. Did you know what particular division or affiliate or subsidiary manufactured caustic soda? A. I didn't know that we manufactured caustic soda.

. . . . . .

[50] Q. Were the goods which finally went forward under this shipment previously allotted to another contract? A. They were probably made up with that thought in mind, yes.

Q. And they were switched from the initial contract to this contract; is that right? A. That is right. That was only part of it, of course. It wasn't the whole transaction; only part of it. That was 500 tons which was in question that they remarked.

. . . . . .

[3]

Part of Plaintiffs' Exhibit 4.

(Dalton Deposition.)

Proceedings.

The depositions herein were taken pursuant to notice at the office of the U. S. Commissioner, Room 321, Post Office Building, New Orleans, Louisiana, on Wednesday, October 21, 1952.

Whereupon, JOHN HANSEN DALTON, called by and on behalf of the plaintiffs, being first sworn by a notary public, was examined and testified as follows:

. . . . . .

[4] *Mr. Dunn:*

Q. What is your present occupation or position? A. Well, I am a steamship agent.

. . . . . .

[5] Q. And what was your position with Hansen & Tidemann, Inc., in 1948? A. I was a vice president and secretary.

. . . . . .

[20] Q. Was your firm the agents, acting in connection with the steamship Hawaiian in New Orleans on or about August 31, 1948? A. If my memory serves me correctly, I believe that we were acting in the capacity of agents for a New York ship operator, not for the owners of the vessel.

Q. What was the position with respect to the vessel of the New York Steamship company for which you were acting? A. As I understood it at that time, the vessel was on time charter to the particular people we were representing, but of that, I wouldn't be sure. I just understood that was the case.

Part of Plaintiffs' Exhibit 4

Q. What was the name of the charterer? A. Isbrandtsen. If he was the charterer, I assume he had the vessel under time-charter, and that was the way I understood it. We were acting as his agent.

[21] Q. Who was the owner? A. That I would guess would be the American-Hawaiian Line, but as we do not represent the owner, I wouldn't know at all. It wouldn't be necessary for me to know who is the owner.

[58] Mr. Dunn:

Q. Will you please read into the record the teletype message recorded on that sheet? A. This is a copy of a telegram form ordinarily used for Hansen & Tidemann to copy telegrams. It is typewritten on this form that "this is a TWX to Houston, August 12th, 1948."

Q. Excuse me. In reading it, Mr. Dalton, would you translate for us any abbreviations or numerals that are used in it? A. Yes, if I can.

This section of it appears to have originated in New Orleans, and it is addressed to apparently our Houston office, "ISBRANDTSEN BOTH BMT"—I don't know in this message what "BMT" means. To me, ordinarily, it would mean "BEAUMONT." The next word is "BOATS CANCELLED UNDERSTAND THOMAS F. BAKER NOW MOBILE EXPECTED TO DEPART AUGUST 23RD. WILL SUBSTITUTE FOR SWISSHELM NEW YORK. ADVISE HER ITINERARY PRIOR TO DEPARTURE MOBILE. CRINKLEY SUPPOSED TO BE NOW MOBILE AND COMING TO NEW ORLEANS SOMETIME TODAY. HOPE HE CAN THROW SOME LIGHT ON SITUATION. MEANTIME KNOW THEY [59] LOOKING AROUND FOR OTHER VESSELS AND DON'T PRESUME CAN TELL TRADE HERE THAT THE BAKER IS THE INDIA VESSEL."

Part of Plaintiffs' Exhibit 4

To which apparently our Houston office replied: "BAKER WE ARE CONTINUING THE SWISSHELM ON INDIA BERTH AS TRADE ALREADY FAMILIAR WITH HER NAME AND SEE NO ADVANTAGE CHANGING UNTIL LAST MOMENT STOP HOPE CRINKLEY CAN STRAIGHTEN OUT THE MATTER AS ISBRANDTSEN NEW YORK OFFICE SPINNING AS FAR AS WE ARE CONCERNED."

And it has an indication here that this cost $1.

Mr. Dunn:

Q. Can you identify Mr. Crinkley for us? A. I don't know his exact title, but the Mr. Crinkley mentioned here is, if not an official, certainly a key man of Isbrandtsen Company in New York.

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[68] Q. Now, you testified that Farrell Shipping Company arranged for the shipping space for this caustic soda, did you not? A. No, I did not testify that way. I think I was asked if I knew who was representing the Colorado Fuel & Iron Company. I said, to the best of my knowledge and belief, Farrell Shipping Company.

Q. In connection with the shipment of caustic soda? [69] A. In connection with the shipment of caustic soda.

Q. And they are known as brokers, in the transaction? A. They are known as brokers, in the transaction.

Q. And they received a certain brokerage commission for their services in such a transaction? A. Ordinarily, yes. You are speaking now from the ship?

Q. From somebody? A. I don't know from the shipper. From the ship, ordinarily, they would get a brokerage.

Q. Did they receive a brokerage fee in connection with this transaction? A. I would have to refer to my records, but I am reasonably sure they did.

Q. There is no doubt about it, is there? A. Not in my mind, no.

Part of Plaintiffs' Exhibit 4

Q. And that brokerage was paid by whom? A. Well, it would be paid by Isbrandtsen Company, whether direct or through me I don't know at this particular moment.

. . . . . .

[77] Q. You testified that there came a time when you were advised that the ship S/S Hawaiian was strike bound. Is that correct? [78] A. I think I could call it correct. I don't know whether I testified that way or not. We were advised that she had stopped working from the Master's instructions to the stevedores.

Q. Did you thereafter or your company apparently notify Farrell Shipping Company of that fact? A. I don't know whether we officially notified Farrell Shipping Company or not.

Q. You used the term "officially." Would you have done it unofficially? A. I would have done it unofficially; yes.

Q. In the normal course of business? A. Yes. They are friends of mine. If we are in trouble, all the people in the shipping business knows it.

Q. So your best recollection is that you did notify Farrell Shipping Company? A. No. That would not be my recollection at all, because I don't know whether I notified Farrell Shipping Company or not.

Q. You say it is your customary practice? A. To talk about those things. That is correct. We would ordinarily tell the shipper of any delay in transporting his cargo. We feel he is entitled to know about that.

Q. Then, you will state you have every reason to believe that you did notify them? A. I have every reason to believe that I notified him, but I cannot say that I did.

Q. The important notification in a case like that is to be given to the people that still has cargo that has not been loaded? A. Yes.

. . . . . .

Part of Plaintiffs' Exhibit 4

[101] Q. Did you notify at any time Farrell about any delay? A. In connection with this caustic soda?

Q. Yes, I am talking about this shipment. The shipments referred to in bills of lading 144 and 145? A. I don't recollect. My memory is not clear whether we [102] notified Farrell or not. There would be no necessity of notifying him formally, but it would be proper to notify him more or less informally as his goods were aboard the ship and the bills of lading were issued.

Q. When you say there would be no necessity of notifying him, will you explain what you mean by that? A. Well, I can't see where it would be too interesting to him, in a formal manner. I can see in one way that he should be formally notified as a broker that his goods were not shipped, or that is, that his goods were being delayed on board this vessel when the fact was known to him.

Q. Was the fact known to him? A. It should be. I don't know whether it was or not, but it should be. I would also assume that it was made known to him through my office, and possibly through other sources. Nothing happens on the waterfront in cases like this that everybody in the business doesn't know something about it.

. . . . . .

Part of Plaintiffs' Exhibit 4

[111]

(Smith Deposition.)

ROBERT T. SMITH, called by and on behalf of the plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

Direct Examination by Mr. Dunn:

Q. Mr. Smith, what is your present occupation or position? A. I am president of the Standard Stevedoring Company, Inc.

. . . . . .

Q. Prior to the establishment of the company you just mentioned, were you with another company in New Orleans? A. January 1—now, I have to figure back—let's see.

Q. Needn't be too precise. A. January 1, 1947, until September 17, 1951, I was vice president and general manager of the New Orleans Stevedoring Company.

Q. How long have you been connected with the Maritime Industry altogether? [112] A. About thirty-eight years.

. . . . . .

[116] Q. Did you through any of these media of public information become informed of a strike situation on the Pacific Coast in the summer of 1948 which threatened to tie up all Pacific Coast shipping and had to be enjoined by the Court under the Taft-Hartley Act?

Mr. Tillinghast: I object to the form of all this questioning. We have allowed considerable latitude and I must insist counsel stop using leading questions. This is a capable witness and he can answer specific questions to his own knowledge.

Part of Plaintiffs' Exhibit 4

Mr. Dunn:

Q. Will you answer the question? A. Will you repeat it, please?

(Question read by the reporter.)

Mr. Tillinghast: I repeat my objection.

Mr. Dunn:

Q. Please state your answer? A. I would say that I was familiar with a threatened or a strike on the West Coast by certain unions, Maritime [117] unions, but as to any reference to the Taft-Hartley Act injunctions, I can't honestly say that I recall that. Naturally, in our business, you are around ships all the time; you hear people talking; you are constantly hearing rumors or true stories of certain happenings, but in this day and age, strikes are nothing uncommon and just like most everything else, I suppose, you get accustomed to hearing strikes and it doesn't have its effect like it did in years gone by.

• • • • • • •

[118] Q. Do you know any of the unions that were involved in that labor dispute? A. To the best of my knowledge, it seems that on the West Coast every department of a vessel has its own union, such as the crew having one union, the cooks and stewards belonging to another union; radio operators, officers, even the engineers, I believe, have a separate union. Being outside of my particular field, I have never paid too much attention to those various unions and their functions.

• • • • • • •

[119] Q. Do you know whether the longshoremen on the Pacific Coast have a different union from the longshoremen in New Orleans? A. They do, the West Coast is C.I.O. affiliate and the Gulf is A. F. of L. affiliate.

Part of Plaintiffs' Exhibit 4

Q. Do you know who headed the longshoremen's union on the Pacific Coast or who headed it in 1948? A. I believe it was Harry Bridges.

Q. Apart from Bridges' union on the Pacific Coast, you testify, I believe, that there is another longshoremen's union on the East Coast to which the longshoremen are affiliated. Clarify that. A. To the best of my knowledge, all your East Coast unions are affiliates of the American Federation of Labor.

Q. And that includes the New Orleans Branch of the Longshoremen? [120] A. The Gulf area.

Q. And the Pacific Coast longshoremen belong to a C.I.O. union? A. That's correct.

Q. Do you recall any strike in this country in which Bridges' C.I.O. union was involved? A. You mean when you say "this country," you mean the West Coast?

Q. I mean—yes, the entire country, or any area of the—I don't mean it had to cover the entire country? A. So far as Harry Bridges is concerned, it's my understanding that any strikes he may call would only be on the West Coast or possibly the Hawaiian Island, where his union has jurisdiction, but his union has no jurisdiction on the East Coast or the Gulf Coast, and, naturally, it would have no authority to call a strike in those areas.

Q. Was his union involved in the 1948 strike? A. I can't recall that.

Q. In connection with your business, did you have any concern as to whether that strike might spread to the East Coast? A. Not so far as our longshore organizations are concerned; the American Federation of Labor or the I.L.A. has never followed Bridges. They are very antagonistic. The I.L.A. locals in the Gulf consider Harry Bridges' organization as communistic, and, to the best of my knowledge, have [121] never gone along with them, and from the remarks of the union leaders, we would never go along with them.

Part of Plaintiffs' Exhibit 4

Q. Have any concern about any other unions spreading their strike beyond the Pacific Coast? A. Well, the only other Pacific Coast unions would naturally be the Maritime unions that control ship personnel. If the ships are manned by unions dominated on the West Coast were in ports in any other section of this country, those ships naturally would go on strike.

Q. Did that actually happen in New Orleans resulting in the tying up of any ship; do you recollect? A. What period are you referring to?

Q. 1948, same period. A. I take it you are referring to the period when the American steamer Hawaiian was in port?

Q. Yes. A. Yes, there were several ships tied up in the Port of New Orleans during that period.

Q. One of them was the S/S Hawaiian, was it? A. That's correct.

Q. And at what wharf was that loading at the time? A. At Westwego Terminals of the Missouri Pacific Railroad or Missouri-Pacific Texas-Pacific.

Q. Were other ships tied up at the same wharf? By tied up, I mean loading operations? [122] A. No, not at Westwego Terminals.

Q. Where, then, if you know? A. Beg pardon?

Q. Where, then, if you know? A. I just don't remember the exact number of ships in port at that time that were involved in the tie-up. I have a recollection of one other ship that was at the New Orleans Port of Embarkation. To the best of my knowledge, they were the only two ships in port loading general cargo at the time.

Q. There were, however, a number of other vessels in the Port of New Orleans which were not affected by any strike or stoppage of work? A. Yes, I'd say there were.

Q. Referring again to the loading of the vessel Hawaiian at New Orleans, did the New Orleans Stevedoring

Part of Plaintiffs' Exhibit 4

Company, Inc., supply the stevedores on that job? A. Yes, sir, they were the contractors designated by Isbrandtsen to load the vessel.

. . . . . .

[130] Q. Were you dealing with the Isbrandtsen New York Office as well as the agents here? A. Yes, my dealings are with the operating man in Isbrandtsen's office. Of course, in a big steamship company, you have the Traffic Department as well, to consult with and usually they are the ones that the agents consult with, the Traffic Department, and often there are a conflict of questions asked by the New York office. For instance, the Traffic Department may ask the agent how much overtime is involved, whereas, on the other hand, the operating department may have asked me directly how much overtime was involved, and sometimes the agents want that information themselves so as to keep abreast of the amount of money required to disburse the vessel because ordinarily they have an advance from the operator on the estimate expenses.

. . . . . .

[134] Q. (Hands document to witness) When did the day shift start on September 3rd? A. Apparently the vessel worked continuously from 7:00 A. M. on Thursday, September 2, until 10:00 A. M. on Friday, September 3.

Q. Do you recall when the night shift went off and the day shift came on? A. I don't recall whether the night shift knocked off at 6:00 A. M. or 7:00 A. M., however, the Port Log indicates continuous work from 1:00 A. M. until 10:00 A. M. Under the normal working plans, the night shift would have stopped at 7:00 A. M. and the day shift taking over at that time.

Q. So that the first two hours of normal days' work would be 7:00 to 9:00? [135] A. Unions have their own interpretation on that. They say that the guarantee of

Part of Plaintiffs' Exhibit 4

two hours in the daytime predicated on a normal working day from 8:00 o'clock. If you call a laborer out an hour earlier, that is, at 7:00 A. M., that's a premium hour and it's not considered in the minimum time. That's been a long dispute between management and unions on that.

Q. So that the two guarantee hours would commence at 8:00 A. M.? A. That's right, according to the union's version.

Q. And you have testified that there were two hours during which your men were engaged in battening down hatches and doing various activities of that type other than actual loading of the vessel? A. I was aboard the vessel that morning and if my memory serves me correctly, I interceded with the union delegate of the ship's crew, whether it was the steward or the firemen, I don't recall, to be given more time to run out the guarantee of the labor. Sometimes, when you are granted a few hours more, you can usually get a few hours more and that's usually our tactics. However, we are naturally interested in minimizing expenses as much as possible so we try to prevent any dead time in being paid to labor.

. . . . . .

[168] Q. Would you say that the operators did all they could to load the vessel while they had the opportunity to do so? A. Yes, I would say so, Mr. Dunn. Every good operator strives very hard to get his ship at sea if there is a pending work stoppage. I might facetiously say that that applies to Christmas, too, and in all my experience, which has been many years, I have naturally come upon many work stpppages, contemplated work stoppages. For instance—

Mr. Tillinghast: Don't stop.

Mr. Bensel: Let him finish his answer.

Part of Plaintiffs' Exhibit 4

A. For instance, if we anticipate trouble through the expiration of our contract, we have often been called [169] upon to try to complete the loading before that trouble happens, if we are sure that it's going to happen.

Mr. Dunn:

Q. And in this particular case you did all that you could to get the ship loaded at that time, is that so? A. I would say that from the record, that's apparently so by reason of working all that night prior to the work stoppage.

Mr. Scott: Your letter of September 2 indicates that you wanted to get the vessel loaded and at sea at the earliest possible, doesn't it?

A. That letter indicates that they wanted the ship to sail on Saturday.

Mr. Scott:

Q. September 4? A. Whatever the date is, and as I say, I don't know whether that was the scheduled sailing date of the vessel or whether that Saturday sailing was in anticipation of the strike. Sometimes unions use a week end as the beginning of a strike.

Mr. Tillinghast:

Q. In the same way, is it customary to suspend ship operations when you consider that a strike might be about to occur? A. No, sir, we keep—

Mr. Dunn: Object to that question.

[170] A. We keep working up till the time we are actually stopped.

Mr. Tillinghast:

Q. Why do you continue to work? A. We continue to work because there is often disturbances of various

kinds that are in the offing, but never materialize. We just couldn't stop industry because of a threatened or a rumored strike.

* * * * * * *

[171] Mr. Tillinghast:

Q. Isn't the element of surprise one of the tactics often used by a labor union in compelling its demands? [172] A. In a general strike, no. However, sometimes the unions will jump the gun on the effective date of the strike which would be an element of surprise in some instances.

Mr. Tillinghast:

Q. Of course, you can't tell in advance how general a strike is going to be, can you? A. Only if it refers to a particular union.

Mr. Dunn:

Q. In connection with this subject of strikes, is picketing a weapon often used by strikers? A. On our river front it's always used.

Q. And the picketing may or may not commence with the declaration of the strike? A. That's so. Sometimes the picket lines are not established until several hours after the strike has actually been called. Sometimes, the pickets are there right on the minute.

Mr. Tillinghast:

Q. Sometimes before, right? A. No, they are not on the line until the minute—they usually don't strike before.

Mr. Dunn:

Q. But there can be a lapse of time depending on the particular case before the picketing is established? A. There can be, but in such instances it's only a matter of [173] an hour or so and that comes about.

Defendant Isbrandtsen's Witness, Matthew S. Crinkley, Direct

Mr. Dunn:

Q. Would you say it never is greater than that? A. As to my knowledge and my experience, it's never been greater than several hours.

Q. But its haste or delays depend upon the individuals who comprise the unions, how they conduct their activities; isn't that so? A. Not necessarily. As an example, a union may declare a certain hour as the effective day of a strike. Certain of the membership of the union become a little hasty and will walk off of their job before that hour is set and sometimes when they walk off before that hour is set, they form their own picket line.

* * * * * * *

Trial Minutes.

(Testimony of Matthew S. Crinkley.)

[317] MATTHEW S. CRINKLEY, called as a witness by defendaent Isbrandtsen Company, Inc., being first duly sworn, testified as follows:

Direct Examination by Mr. Scott:

Q. By whom are you employed, Mr. Crinkley? A. By the Isbrandtsen Company, Inc., of New York.

Q. What is your position? A. My position is executive vice president.

Q. How long have you held that position? A. Two years. Before that I was vice president since about 1936 or 1937.

* * * * * * *

[320] The Court: What was the ordinary time that was taken in 1947 and 1948, for a voyage from New Orleans to Bombay, India, of a freight cargo steamer or vessel?

The Witness: I think it might have been [321] on a direct voyage through the Mediterranean, that is, from New

Orleans through the Mediterranean to Bombay about 25, 24 or 25 days, I understand, if the ship, for instance, did not go to other ports en route.

The Court: Is it usual to have a ship go direct from New Orleans to Bombay without discharging cargo at intervening ports at the time the shipment is booked?

The Witness: I don't think it was usual. I cannot speak of operations of some of the lines—

The Court: The Isbrandtsen vessels that made this voyage at or about September, 1948, what was the average time that they took to complete the voyage from New Orleans to Bombay, India?

The Witness: We did not have regular line service and regular line sailings from the United States gulf ports to that area because that presented a special berth sailing.

The Court: Was it the inauguration of a new service?

The Witness: No, sir. There was a demand by a great many shippers for service because the lines that were in regular operation were not able to take [322] care of the volume of cargo moving at that time.

The Court: Moving from where to where?

The Witness: From the United States Gulf ports to the Persian Gulf and India.

The Court: Are you familiar with the usual route taken or that was taken in September, 1948 for a cargo vessel traveling from New Oarleans to Bombay?

The Witness: Yes, sir, to this extent, and one American line that I know of goes to India by the Persian Gulf, and another one goes to Indian ports and then around to Calcutta.

The Court: Is it the usual route through the mediterranean and Suez?

The Witness: Yes, sir.

The Court: That was the usual run.

The Witness: Yes, sir.

Defendant Isbrandtsen's Witness, Matthew S. Crinkley, Cross

By Mr. Scott:

Q. Did this vessel take the usual route? A. Well, as I said, there are two routes that I know of and there may have been others. I don't know whether you could say it is a usual route or not, but we laid out the itinerary of the vessel from the time that we arranged the sailing to [323] go to Bombay, India via the Persian Gulf.

Q. Was this a normal voyage after the vessel left the Port of New Orleans? A. Yes, sir, I would say it was.

. . . . . .

Cross Examination by Mr. Tillinghast:

Q. Mr. Crinkley, in what business is the Isbrandtsen Company engaged, please? A. Well, as far as the steamship business, I suppose you might say our business is the accommodation of regular established line service and of tramp or charter service. Both types are done by the company and have been through the years.

Q. You use ships which your company owns in your service and you also charter ships when the requirement arises, is that true? [324] A. That is true and has been true all through the existence of the firm.

Q. How many vessels did your company own in 1948? A. I would say approximately 10.

Q. Well, for what purpose would you charter ships, when would the need arise for you to charter ships? A. Well, I say at that time we were operating owned and chartered ships to a number that would vary from 60 to 80. On the vessels that we chartered we operated some of those in line or berth service and some of them in tramp service.

Q. Is it fair to say that you would charter ships to ship cargo which was booked and which your own ships were unable to take for some reason or other? A. That could be true; it wasn't a usual thing.

Defendant Isbrandtsen's Witness, Matthew S. Crinkley, Cross

Q. When you chartered a ship you shipped cargo for which you contracted, isn't that true? A. Yes, sir, but it might not be cargo moving on one of our regular line routes.

Q. What was your purpose in chartering the Hawaiian in 1948? A. To perform this voyage from the United States Gulf ports to the Persian Gulf and to India.

[332] Q. In 1948, Mr. Crinkley, were the crews of the vessels which your company owned unionized? A. Yes, sir.

Q. There was considerable labor unrest during that year in the maritime industry, wasn't there? A. Yes, sir.

Q. You were aware of that unrest, were you not? A. Yes.

Q. Did you know that the collective bargaining agreements had expired on the 15th of June, 1948? A. We knew that that was so, yes.

Q. Isn't it true that your company either on its own behalf or through collective action with other owners had negotiated towards settlement of these disputes with your unions? A. That's right.

Q. Did you know that during this period, particularly in August, that the Isbrandtsen Company was the subject of injunctive actions by the United States Government in a suit pending in New York? A. I think you will have to identify it a little further than that. I just don't offhand recall.

Q. Do you recall that your company was served with papers in connection with a suit brought by the [333] Government against all the maritime unions, longshore unions and the operators enjoining strikes and lockouts? A. Yes, I think I understand what you mean there.

Defendant Isbrandtsen's Witness, Matthew S. Crinkley, Cross

Q. Are you aware of that situation? A. Yes. You mean of the whole industry?

Q. Yes. A. Not just the Isbrandtsen Company alone.

Q. No, of course not. By the way, was the labor unrest localized to any particular port or part of the country? A. I think it was rather general.

. . . . . .

[335] By Mr. Scott:

Q. As between Isbrandtsen and American-Hawaiian Steamship Company, who had charge of the labor relations with the crew? A. American-Hawaiian. That was a time chartered vessel in which the charterer, in this case Isbrandtsen, has nothing to do with the supplying or dealing with the crew.

Mr. Scott: That is all.

By Mr. Bensel:

Q. Mr. Crinkley, on the ships that Isbrandtsen either owns or operates itself—I am referring back to the period 1948—were the crews of those ships unionized? A. Yes, sir.

Q. And were they East Coast unions? A. Yes, sir.

Q. Gulf Coast unions? A. Well, they were East Coast unions.

Q. In other words, the crews of the Isbrandtsen ships were members of East Coast unions? [336] A. Yes, sir.

Mr. Bensel: That is all.

Cross Examination by Mr. Dunn:

Q. Mr. Crinkley, weren't some of the unions on Isbrandtsen ships national unions? A. I think they all call themselves national unions.

Defendant Isbrandtsen's Witness, Matthew S. Crinkley, Cross

Q. What I am getting at is, weren't some of the unions on the Isbrandtsen ships also on the American-Hawaiian Steamship Line ships and other lines throughout the country? A. I am not certain as to whether or not some of the several unions that are represented on the ship may have been the same East and West Coast.

Q. They may well have been the same; is that your position? A. Some of them may have been the same. I know some of them were not the same.

Q. Was the American-Hawaiian Steamship Company, to your knowledge, domiciled in California in 1948? A. That is my understanding.

Q. So would you think of it, then, in terms of a West Coast line? A. I beg your pardon.

[337] Q. Were you thinking of it, then, in terms of a West Coast line when you used these terms "East Coast" and "West Coast"? A. It is not just that it was a West Coast Line. The American-Hawaiian Company is a very, very old line. They had certain operations and they owned vessels which they did not always use in their line services which included the vessel we chartered from them. I just had in mind that they were a West Coast firm with its main offices in San Francisco.

Q. Would you find it in any way unusual if they had in their personnel West Coast union members? A. Would I have found it unusual?

Q. Yes. A. No. I would say, as a matter of fact, in answer to that question, that in my own particular work with the company and having primarily to do with the quotation of freight rates, the booking of cargo and arranging of voyages, that I personally don't deal with crew matters. I just say that there so you will understand my answer to your question.

* * * * * * *

Defendant American-Hawaiian's Witness, Robert L. Gray, Direct.

(Testimony of Robert L. Gray.)

[398] ROBERT L. GRAY, called as a witness on behalf of American-Hawaiian Steamship Company, being first duly sworn, testified as follows:

Direct Examination by Mr. Tillinghast:

Q. By whom are you employed, Mr. Gray? A. American-Hawaiian Steamship Company.

Q. In what position? A. Vice president and operating manager.

Q. And what position did you hold with your company in 1948? A. Two positions, prior to the first of [399] September, Acting Atlantic Operations Manager, and after the 1st, Atlantic Operations Manager.

. . . . . .

Q. Were you in charge of any vessels operating out of any other ports, on the West Coast, for example? A. No, the West Coast was handled by the Pacific operating manager.

Q. And when a ship came to the East Coast then it came under your dominion? A. That is correct.

Q. And how about the ships in the Gulf? A. The Gulf came under the Atlantic Coast.

Q. Under your dominion also? A. Yes.

Q. So that did your duties include, among other things, arranging for charters of your ships at that time [400] when they were not required in your own services? A. Yes, sir.

Q. Did your company in 1948 own the S. S. Hawaiian? A. Yes.

Q. In August of that year did your company negotiate a charter of that ship with Isbrandtsen Company? A. Yes.

. . . . . .

Defendant American-Hawaiian's Witness, Robert L. Gray, Direct

[408] Q. After the crew walked off the ship, what action, if any, did the Isbrandtsen Company take? A. I imagine they stopped loading cargo.

Q. Did they also declare the ship off hire? A. Oh, yes, they declared the ship off hire, yes.

Q. When was hire next resumed, Mr. Gray? A. When the ship went back into operation sometime in December.

Q. After the strike was over? A. Yes.

. . . . . .

[410] Q. When did the collective bargaining agreements, if you know, between the union and your company expire by their terms? A. I think it was in June sometime. I don't remember the exact date.

Q. Were there any negotiations between the time the contract expired by its terms and possibly prior thereto up to the time the vessel went on strike? A. Yes.

[411] Q. Were those negotiations continuous? A. Yes, they were.

Q. Were all disputes unresolved during this period by negotiation? Did all the disputes remain unresolved? Were you in agreement with the unions on anything? A. Oh, yes, on some things we were in agreement and other things not.

Q. What would you say with respect to the prospects of a strike, say, in the middle of August, 1948? Did you know the strike was going to occur? A. No, I did not.

Q. Were you optimistic that the disputes would be resolved by negotiation? A. I thought we would get together, yes.

Q. Right up to the last minute? A. Yes.

Q. And when—

Mr. Dunn: Just a moment. The question, I believe, was with reference to the middle of August.

Mr. Tillinghast: Right up to the time the crew walked off on the strike at the last minute.

Defendant American-Hawaiian's Witness, Robert L. Gray, Cross

Mr. Dunn: It is leading, but I will withdraw my objection.

[412] By Mr. Tillinghast:

Q. Do you know if they were negotiating on the 2nd of September, Mr. Gray? A. Yes, I believe they had a meeting the morning of the 2nd of September.

Q. And at that time they were in agreement on a great many things, weren't they? A. On some things they were in agreement, yes.

Q. When the strike was finally declared, how long was it going to last? A. At that time I did not know.

Q. Did anybody know? A. I don't believe so.

Q. Did the negotiations continue after the strike was declared? A. Yes, they did.

Q. The disputes might have been settled at any time, isn't that true? A. Oh, yes.

Mr. Tillinghast: I have no further questions.

Mr. Bensel: No questions.

Mr. Scott: No questions, your Honor.

The Court: All right, Mr. Dunn.

[413] *Cross Examination by Mr. Dunn:*

Q. When you offered this vessel to Isbrandtsen for charter, did you tell them anything about the strike to which she might be subject? A. I did not.

Q. Did you assume they knew as much about it as they did? A. I would assume so, yes.

Q. Did you communicate with Isbrandtsen about the course of this strike at any time from the chartering of the vessel until the eventual tieup? A. I have no recollection of having done so.

Q. I will show you a document to refresh your recollection of at least one instance, a telegram marked Plain-

tiff's Exhibit 4, a sub-exhibit to Plaintiff's Exhibit 4 in this case (handing to witness). A. Yes, this is from me.

. . . . . .

[415] Q. Did you send similar telegrams to any other vessels of your company? A. I believe I did, yes.

Q. Did you give the master of the Hawaiian any instructions concerning leaving port in view of the threatened strike? A. I don't recall giving him any instructions about leaving the port on account of a strike, no.

Q. Where did you get your information as to the labor situation mentioned in that telegram? A. From San Francisco.

Q. What material did you receive from San Francisco, if any, on the basis of which you composed that telegram that you sent to Captain Masse? A. The telegram that was sent to Captain Masse was outlined by Mr. Plant. He was our vice president [416] of operations. He instructed me what to send.

Q. He was at San Francisco? A. San Francisco, yes.

Q. Did he talk to you generally about the strike situation out there at the time he communicated with you? A. Yes.

Q. Was this on the telephone or by some other method? A. Telephone conversations, teletypes. I don't recall any letters. Things were happening so fast it had to go that way.

Q. Was he keeping you informed in that fashion as time went along, let's say, for days prior to September 2nd? A. Yes, in general I was kept very well informed of what was going on.

Q. On September 2nd did he inform you that the longshoremen were on strike in San Francisco, up and down the Pacific Coast? A. I don't recall that. I recall that he told me the situation didn't look too good.

Q. With respect to the longshoremen, the union headed by Harry Bridges, did he inform you that on September

Defendant American-Hawaiian's Witness, Frank H. Bain, Direct

[417] 2nd they had actually gone on strike on the Pacific Coast from Los Angeles to Seattle? A. I can't recall that he specifically did. No doubt the way things were going he did. My primary interest was in the maritime section of the seagoing personnel.

Q. But he talked to you generally about what the situation was? A. Yes.

Q. Did he tell you in any manner at that time whether the injunction had been lifted on the Pacific Coast? A. Well, the injunction proceedings and matters pertaining to it were generally well known to us here.

• • • • • • •

[420] Q. Did you know at that time that a strike would be called? A. The only thing I knew at that time was that the situation did not look good.

Q. That was in the afternoon of September 2nd, as I recall? A. That is true.

(Testimony of Frank H. Bain.)

[422] FRANK H. BAIN, called as a witness by defendant, American-Hawaiian Steamship Company, being first duly sworn, testified as follows:

Direct Examination by Mr. Tillinghast:

Q. Captain Bain, by whom are you employed, please? A. American-Hawaiian Steamship Company.

Q. Were you employed by that company in 1948? A. Yes.

Q. In what position? A. I was Atlantic marine superintendent.

• • • • • • •

[427] Q. Were you familiar with the negotiation of labor disputes during the year 1948 between your company and the maritime unions? A. In general, yes.

Defendant American-Hawaiian's Witness, Frank H. Bain, Cross

Q. Were those negotiations fairly continuous? A. Yes, they were.

[428] Q. Up to the time the strike was declared? A. That's correct.

Q. Did you consider that there would be a strike? A. No, we were all quite optimistic that there would not be a strike, that negotiations would continue.

Q. Did you carry on your business on a day-to-day basis with that in mind? A. That's right. We continued on in a normal way.

Q. When the strike was finally declared, was there any way of knowing what its duration would be? A. No.

Q. Did your company continue to negotiate with the unions toward a settlement? A. I understand that they did, yes.

Mr. Pillinghast: That's all.

Mr. Bensel: No questions.

Mr. Scott: No questions.

Cross Examination by Mr. Dunn:

Q. In view of the fact the log is in evidence I will not question about that.

Captain Bain, with respect to the remark just made about being optimistic concerning the strike situation, you based that, did you not, on the fact that [429] the negotiations were continuing? A. That's right.

Q. Those negotiations had begun sometime prior to June 14, 1948, had they not? A. That's right.

Q. And they continued all through the 80-day period of the Taft-Hartley injunction? A. Yes.

Q. And thereafter, after the strike began, they continued all the way up to December 13th before they resulted in a settlement; is that correct? A. That's right.

Mr. Dunn: That's all.

The Court: Thank you.

(Witness excused.)

Part of Plaintiffs' Exhibit 4

Gray Telegram of September 2, 1948.

(Part of Plaintiff's Exhibit 4.)

CDU227 RX PD=CD NEWYORK NY 2 116P=

1948 SEP 2 PM 1 07

HANSEN & TIDEMANN=
CARONDELET BLDG NRLNS=

FOR CAPTAIN MASSE MASTER SS HAWAIIAN. WITH REFERENCE TO PRESENT LABOR SITUATION, FOLLOWING INSTRUCTIONS ARE TO BE COMPLIED WITH ON YOUR VESSEL. THE GENERAL PRINCIPLE OF NO WORK NO PAY WILL APPLY. UNTIL FURTHER NOTICE DO NOT PAY OFF ANYONE EXCEPT FOR GOOD AND SUFFICIENT REASON AS WE WILL NOT BREAK ARTICLES. ANYONE LEAVING VESSEL WILL BE DECLARED DESERTER AND WE MUST IN ALL WAYS PROTECT OUR LEGAL RIGHTS. MASTERS SHOULD MAKE FULL ENTRIES IN LOG BOOK REGARDING THE LAST SHIFT WORKED OR THE LAST MOMENT PEOPLE ABOARD. THESE LOG ENTRIES SHOULD BE MADE IN THE DECK BRIDGE LOG BOOK. MASTER SHOULD KEEP A DAY BY DAY RCEORD OF ALL PEOPLE REMAINING ABOARD VESSEL. ANYONE LEAVING VESSEL SHOULD BE INCLUDED IN THE DAY BY DAY RECORD GIVING THE TIME MAN LEFT VESSEL AND REASON FOR SO DOING. IN THE EVENT THAT IT BECOMES NECESSARY TO SHUT DOWN VESSEL MASTERS ARE TO TAKE ALL PRECAUTIONS REGARDING VESSELS SECURITY. THIS INCLUDES PROPER SECURING OF PLANT. ADEQUATE FIRE PROTECTION AND LIGHTING. TO

Part of Plaintiffs' Exhibit 4

BE ARRANGED. ADEQUATE SECURITY WATCHES TO BE MAINTAINED. A DAY BY DAY REPORT IS TO BE MADE TO THIS OFFICE REGARDING STATUS OF EACH VESSEL=

R L GRAY AMERICAN HAWAIIAN SS CO=

Gray Telegram of September 3, 1948.

(Part of Plaintiff's Exhibit 4.)

CDU235 LONG PD=CD NEW YORK NY 3 258P=

1948 SEP 3 PM 2 34

HANSEN & TIDEMANN=
CARONDELET BLDG NRLNS=

FOR CAPTAIN MASSE MASTER SS HAWAIIAN SUPPLEMENTING MY PREVIOUS WIRE RE YOUR VESSEL MR. PLANT HAS ADVISED AS FOLLOWS: ON ALL VESSELS THAT HAVE ARTICLES OPEN, ARTICLES ARE TO BE KEPT OPEN AND ALL STRIKERS ARE TO BE LOGGED DESERTERS AND FOR PURPOSE OF UNEMPLOYMENT INSURANCE IF THEY DEMAND TO BE PAID OFF ADVISE THEM CONTINUED EMPLOYMENT IS AVAILABLE TO THEM. AS MATES AND SAILORS ARE NOT ON STRIKE THEY ARE TO BE PAID OFF BY MUTUAL CONSENT AFTER ALL VESSEL REQUIREMENTS FOR SAFETY AND SECURITY HAVE BEEN MET UNLESS IN YOUR OPINION YOU CONSIDER ANY OF THESE MEN NECESSARY FOR SECURITY OF SHIP AND CARGO=

R L GRAY AMERICAN HAWAIIAN SS CO=

Office - Supreme Court, U.S.
FILED
AUG 20 1957
JOHN T. FEY, Clerk

No. 391

United States Court of Appeals

FOR THE SECOND CIRCUIT

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

Plaintiffs-Appellants,

against

THE COLORADO FUEL AND IRON CORPORATION, ISBRANDTSEN COMPANY, INC.,

Defendants-Appellees,

and

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Defendant-Appellee-Appellant.

(Civil Action No. 62-10)

APPENDIX TO BRIEF OF DEFENDANT-APPELLEE, THE COLORADO FUEL AND IRON CORPORATION

On Appeal from the United States District Court for the Southern District of New York

Kelley, Drye, Newhall & Maginnes,
Attorneys for Defendant-Appellee,
The Colorado Fuel and Iron Corporation,
70 Broadway,
New York, N. Y.

Francis S. Bensel,
W. Frederick Knecht,
of Counsel.

INDEX

	PAGE
Answer	1a
Notice to Amend	8a
Trial Minutes	10a
Plaintiffs' Witnesses:	
Charles J. Conlon,	
Direct	10a
Cross	12a
Re-cross	18a
Cyril F. Powers,	
Cross	18a
Defendant's, Colorado Fuel and Iron Corp., Witnesses:	
Frederick R. Becker, Jr.,	
Direct	20a
Cross	24a
Re-direct	27a
Ward Wire,	
Direct	28a
Defendant's, Isbrandtsen Company, Inc., Witness:	
Siguard E. Simpson, Jr.,	
Re-cross	30a

EXHIBITS

PAGE

Plaintiffs' Exhibits:

1—(In Part) (Stipulation) 31a

4—(In Part) (Dalton Deposition) 43a

(Smith Deposition) 44a

(Becker Deposition) 46a

(Defendants' Exhibit B) 51a

(Defendants' Exhibit I) 52a

(Transcript of Newspaper Stories Re 1948 Maritime Strike) 54a

6—(In Part) (Morgan Deposition) 54a

Defendant Colorado's Exhibits:

A—Letter, dated July 29, 1948 ..... 58a

B—Letter, dated September 20, 1948 ..... 60a

C—Telegram 61a

D—Letter, dated September 13, 1948 ..... 61a

Answer.

[523]

Defendant, The Colorado Fuel and Iron Corporation, by Rathbone, Perry, Kelley & Drye, its attorneys, for its answer to the First, Second, Third and Fifth alleged causes of action set forth in the complaint, alleges as follows:

First Defense

I. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs (a), (b), (d), (e) and (f) of paragraph 1 of the complaint.

II. It denies each and every allegation contained in paragraph 2 of the complaint, except that it admits that during the month of August, 1948, an agreement in writing was entered into between plaintiffs and this defendant in and by which this defendant agreed to sell, and plaintiffs [524] agreed to purchase, 2000 long tons of caustic soda solid, 76% alkalinity N. Y. & L. Test, packed in steel drums, at a price of 9½ cents per pound, C.I.F. Bombay, India, payable by plaintiffs in U. S. dollars by irrevocable letter of credit in this defendant's favor, and except that it further admits that said agreement, as subsequently modified by the parties thereto, required this defendant to make shipment to plaintiffs at Bombay, India, of a portion of said 2000 long tons of caustic soda from a port in the Gulf of Mexico, U.S.A., not later than September 22, 1948, and of a further portion thereof from a port in the Gulf of Mexico, U.S.A., not later than October 10, 1948.

Answer.

III. It denies the allegations contained in paragraph 3 of the complaint in that plaintiffs, on October 9, 1948, cancelled the said agreement referred to in paragraph II hereof to the extent that the same provided for the sale by this defendant, and the purchase by plaintiffs, of 508.58 long tons of said caustic soda.

IV. It denies each and every allegation contained in paragraphs 4 and 5 of the complaint.

V. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint, except that it denies that the said agreement between plaintiffs and this defendant contemplated or provided any time, reasonable or otherwise, for the arrival of said caustic soda at Bombay, India.

VI. It denies each and every allegation contained [525] in paragraph 7 of the complaint, except that it admits that on or about September 7, 1948, this defendant drew and presented its sight drafts under letters of credit opened in its favor for the account of plaintiffs and for the account of plaintiff, R. S. Dass Badhwar, respectively, and subsequently received in payment thereof the sum of $317,375.53.

VII. It denies each and every allegation contained in paragraph 8 of the complaint.

VIII. It denies each and every allegation contained in paragraph 10 of the complaint, except that it admits that on or about August 18, 1948, plaintiffs caused an irrevocable letter of credit, dated August 19, 1948, to be opened by The National City Bank of New York in favor of one W. A. Bartle for the sum of $239,000.00, and that plaintiffs, in order to comply with the terms of the said agreement referred to in paragraph II hereof, there-

after and on or about August 25, 1948, caused said letter of credit to be amended by The National City Bank of New York by changing the beneficiary thereof from said W. A. Bartle to this defendant.

IX. It denies each and every allegation contained in paragraph 11 of the complaint, except that it admits that the said letter of credit referred to in paragraph VIII hereof, as amended, provided that sight drafts drawn thereunder would be honored if presented at the office of The National City Bank of New York, 55 Wall Street, New York, N. Y., on or before October 25, 1948, and if accompanied, among other things, by a full set or sets of on [526] board ocean bills of lading, dated at the latest October 10, 1948, evidencing the shipment by this defendant of caustic soda from U. S. ports to Bombay in one or more shipments.

X. It denies each and every allegation contained in paragraph 12 of the complaint, except that it admits that, in purported compliance with the said agreement referred to in paragraph II hereof, plaintiff R. S. Dass Badhwar, on or about August 25, 1948, caused an irrevocable letter of credit, dated August 26, 1948, to be opened by The National City Bank of New York in favor of this defendant for the sum of $186,600.00

XI. It denies each and every allegation contained in paragraph 13 of the complaint, except that it admits that the said letter of credit referred to in paragraph X hereof provided that sight drafts drawn thereunder would be honored if presented at the office of The National City Bank of New York, 55 Wall Street, New York, N. Y., on or before October 7, 1948, and if accompanied, among other things, by a full set or sets of on board ocean bills of lading, dated at the latest September 22, 1948, evidencing the shipment by this defendant of caustic soda from U. S. ports to Bombay in one or more shipments.

Answer.

XII. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint, except that it admits, upon information and belief, that at all the times mentioned in the complaint defendant, Isbrandtsen Company, Inc. was, and is, engaged in business as a common carrier for hire.

[887] XIII. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the complaint.

XIV. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the complaint, except that it denies each and every allegation therein contained insofar as the same refers or relates to this defendant, and except that it admits that the S. S. HAWAIIAN arrived at Westwego Wharf No. 3, New Orleans, Louisiana, on August 31, 1948, at approximately 12:30 P. M., and that loading on board said vessel of caustic soda destined for plaintiffs at Bombay, India, was thereafter commenced.

XV. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17, 18 and 19 of the complaint.

XVI. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the complaint, except that it denies each and every allegation therein contained insofar as the same refers or relates to this defendant.

XVII. It denies each and every allegation contained in paragraphs 21 and 22 of the complaint.

XVIII. It denies each and every allegation contained in paragraphs 23 and 24 of the complaint, except that it admits that the loading of caustic soda destined for

plaintiffs was continued after 10:30 A. M. on September 2, 1948.

[528] XIX. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the complaint.

XX. It denies each and every allegation contained in paragraph 26 of the complaint, except that it admits that on September 3, 1948, defendant, Isbrandtsen Company, Inc., issued to this defendant full sets of on board ocean bills of lading for a total of 4,799 drums of caustic soda, 76% solid (N. Y. & L.), showing freight prepaid and made out to the order of The National City Bank of New York, New York City, N. Y., or assigns, as consignee, and that this defendant thereafter and on or about September 7, 1948, utilized said bills of lading to obtain payment from The National City Bank of New York of the sum of $317,375.53 under the said letters of credit referred to in paragraphs VIII and X hereof, and except that it further admits that this defendant paid defendant, Isbrandtsen Company, Inc., freightage to Bombay on said caustic soda.

XXI. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the complaint, except that it denies each and every allegation therein contained insofar as the same refers or relates to this defendant, and except that it further denies that any strike on the part of officers and crew of the vessel therein referred to was in existence, or that said vessel was without operating personnel, at the time any caustic soda destined for plaintiffs was in the course of being loaded on board said vessel.

[529] XXII. It denies each and every allegation contained in paragraph 28 of the complaint, except that it

is without any knowledge or information sufficient to form a belief as to whether or not the said vessel therein referred to became and remained immobilized at New Orleans until December 9, 1948, as to when the alleged strikes therein mentioned were terminated, as to whether or not the said vessel therein referred remained at New Orleans an additional period of time subsequent to December 9, 1948 and put in at one or more other ports or places for the purposes and reasons therein alleged, and as to when the said vessel therein referred to reached Bombay, India.

XXIII. It denies each and every allegation contained in paragraph 29 of the complaint.

XXIV. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the complaint, except that it denies that any caustic soda destined for plaintiffs was loaded aboard the vessel therein referred to while said vessel was strikebound or while the same was immobilized and unable to be used as a carrier of said caustic soda under normal conditions, and except that it further denies that defendant, Isbrandtsen Company, Inc., carelessly, negligently or wantonly issued any on board bill or bills of lading to this defendant which enabled this defendant to draw upon the letters of credit purportedly described therein and referred to in paragraphs VIII and X hereof and to obtain from the avails thereof said sum of $317,375.53.

XXV. It denies each and every allegation contained in paragraph 31 of the complaint.

[530] XXVI. It denies each and every allegation contained in paragraphs 33 and 34 of the complaint.

XXVII. It denies each and every allegation contained in paragraph 40 of the complaint.

Answer.

XXVIII. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the complaint.

XXIX. It is without any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of the complaint, except that it denies each and every allegation therein contained insofar as the same refers or relates to this defendant.

SECOND DEFENSE

XXX. The First, Second, Third and Fifth alleged causes of action set forth in the complaint each fails to state a claim against this defendant upon which relief can be granted.

WHEREFORE, defendant, The Colorado Fuel and Iron Corporation, demands judgment dismissing the First, Second, Third and Fifth alleged causes of action set forth in the complaint, together with the costs and disbursements of this action.

RATHBONE, PERRY, KELLEY & DRYE,

By FRANCIS S. BENSEL
a member of said firm
Attorneys for Defendant,
The Colorado Fuel and
Corporation,
Office and P. O. Address:
No. 70 Broadway,
Borough of Manhattan,
New York City.

Notice to Amend.

[1450]

Sirs:

Please take notice that, upon the opening of the trial of this action, defendant The Colorado Fuel and Iron Corporation will move to amend its answer herein by adding thereto the following:

Third Defense

XXXI. The alleged claims set forth in the First, Second, Third and Fifth alleged causes of action contained in the complaint arose out of matters occurring, if at all, in the State of Louisiana in or about September, 1948, at which time the same accrued, if at all, in favor of plaintiffs, non-residents of the State of New York.

XXXII. This action was commenced on October 26, 1950, at which time said alleged claims were, and at all times since have been, prescribed by one year under the [1451] Louisiana statutes, to wit, Articles 3536 and 3537 of the Louisiana Civil Code, then and now in full force and effect.

XXXIII. By reason of the premises and under and by virtue of the provisions of Section 13 of the New York Civil Practice Act, this action, as to each of said alleged

claims, was commenced after the expiration of the time limited by law for bringing an action thereon.

Dated: January 6, 1955.

Yours, etc.,

KELLEY, DRYE, NEWHALL & MAGINNES,

By LEONARD A. BLUE,
a member of said firm
Attorneys for Defendant,
The Colorado Fuel and Iron Corporation,
Office and P. O. Address:
No. 70 Broadway,
Borough of Manhattan,
New York 4, New York.

To:

DUNN & ZUCKERMAN, Esqs.,
Attorneys for Plaintiffs,
1475 Broadway,
New York 36, N. Y.

LORD, DAY & LORD, Esqs.,
Attorneys for Defendant
Isbrandtsen Company, Inc.,
25 Broadway,
New York 4, N. Y.

KIRLIN, CAMPBELL & KEATING, Esqs.,
Attorneys for Defendant,
American-Hawaiian Steamship Company,
120 Broadway,
New York 5, N. Y.

Trial Minutes.

* * *

[121] CHARLES J. CONLON, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Dunn:

Q. Mr. Conlon, what is your occupation? A. I am engaged as a foreign freight forwarder doing business under the name of Shippers Export Service Company, which I have—

Q. Where is your office? A. 368 Broadway, New York City.

* * *

[124] Q. Were you engaged in that business in 1948? A. Yes, sir.

Q. Do you recall the Maritime strike of 1948 that affected the West Coast and East Coast? A. Yes, sir.

Q. Were you in business at that time and during that period of time? A. Yes.

* * *

[127] By the Court:

Q. In your conversations with various persons did you have any difficulty arranging for shipments [128] from Gulf ports to ports in India during the month of June, 1948? A. Offhand I would have to say that I don't recall any.

Q. During the month of July, 1948 did you send out shipments and were you able to secure cargo space for shipments going from the Gulf ports to ports in India? A. Well, that again I would have to look into my records to indicate whether we had such shipments or not.

Q. With reference to August 1948, what was the condition? A. Well, we had no difficulty in making bookings.

Charles J. Conlon—For Plaintiffs—Direct.

Q. Did you forward shipments during August 1948 from Gulf ports destined to ports in India? A. Well, we may have. I would have to look into the files to find out.

Q. You don't know? A. Not offhand, no, without looking into the files.

Q. In September 1948 did you have any difficulty in securing cargo space for shipments from Gulf ports to ports of India? [129] A. None that I know of, but, as I said, I will have to look into the records to verify it.

• • •

[135] The Court: I think the point that was made by the defendant Colorado was that they did not know that the vessel was manned by a west coast crew, that is, that the crew of the Hawaiian were members of the West Coast Maritime Union which had not settled with the ship operators.

Mr. Dunn: That is the same as saying that they did not know the owner of the vessel.

Mr. Bensel: No.

The Court: No, there is a distinct difference, counsel.

Were you concerned with the flag of registry or were you concerned with the flag of the charterer and operator of the vessel?

The Witness: Well, I can answer that: We were concerned with the flag of the vessel that you were going to ship your goods on.

The Court: Were you at all concerned or was the industry concerned with the operator of the vessel or the one who had the vessel under charter?

The Witness: Yes, sir.

By Mr. Dunn:

Q. Did you have to know both at the inception of your duties? A. No, because in some cases, if it is [136] a

chartered vessel you wouldn't know who the ownership was.

The Court: And you made no inquiry of it?

The Witness: Ordinarily not.

The Court: Suppose you had arranged a shipment and cargo space on one of the Isthmian Line ships—you have done that, haven't you?

The Witness: Yes, sir.

The Court: Your agreement would be made solely with the Isthmian Line?

The Witness: That's right.

The Court: And you would be told what particular vessel your cargo space was on, is that correct?

The Witness: That's right.

The Court: You would not be concerned, would you, as to whether or not the ownership of the vessel itself was Isthmian or anybody else, would you, as long as Isthmian represented to you that they had a charter of the vessel?

The Witness: No. In an instance like that you would know the ownership because certain other phases of the industry comes in, such as insurance, and you find out the rating of the vessel, and in doing so you find out who is the actual owner of the [137] vessel.

* * *

Cross Examination by Mr. Bensel:

* * *

[139] Q. Now, it is the custom and practice of freight forwarders to make these freight engagement arrangements well in advance of the contemplated shipment, is it not? A. That's right.

Q. And that is especially true, is it not, in the case of considerable bulk of merchandise? A. That is true.

Charles J. Conlon—For Plaintiffs—Cross.

Q. As distinguished from a small shipment? A. That is true.

Q. In the case of a small shipment, you can place it very quickly and easily? A. That's right.

Q. Have you ever had occasion to arrange for the [140] trans-shipment by ocean voyage of caustic soda? A. Yes.

Q. In substantial quantities? A. Yes.

Q. Such as a thousand or two thousand tons? A. Probably not all at one time, but on an average—

Q. I am talking about one shipment. A. Not one shipment.

Q. How large was the shipment or shipments that you were concerned with of caustic soda? A. Anywheres from three to five hundred tons at one time.

Q. That is a difficult cargo to arrange for, isn't it? A. Yes, very difficult.

Q. Do you know why? A. Why, certainly.

Q. Tell us why. A. Because the soda eats away the drums through bad handling and stevedores don't like to handle it and neither does the shipping company.

• • •

[143] Q. If you were commissioned by a customer to arrange for shipment of a thousand or two thousand tons of caustic soda from New Orleans to Bombay, you would set about to make those arrangements at as early a date as possible, would you not? A. As soon as you found out about it and you got the contract.

Q. It would take a considerable period of time to make those arrangements, would it not, in the normal course of your business? A. Well, it all depended on the availability of the steamer.

Q. But you would set about as soon as possible to make those arrangements? A. As soon as you got your contract or information as to the nature of the tonnage and

all that, it would be your duty to set it up immediately so that it could move.

Q. As much as two or three months in advance, if you have the information? A. Usually cargo of that nature you would have to have that much time.

• • •

[145] Q. Prior to September 1, 1948, did you on behalf of customers make freight engagement arrangements for ocean transported merchandise? A. Yes.

Q. For sailings scheduled after the first of September? A. Yes.

Q. In other words, during this period of June, [146] July, August of 1948, you as freight forwarder acting on behalf of your customers continued to make the usual freight engagement contracts for future shipments? A. Right.

Q. Out of the Port of New York, out of other East Coast ports and out of Gulf ports, isn't that correct? A. Yes, that's right.

Q. Even though, as you say, you kept abreast and had knowledge of this threatened strike? A. Yes.

The Court: You say that it was difficult to arrange for cargo space for the shipment of caustic soda; is that your testimony?

The Witness: That's right.

The Court: Had you ever been refused cargo space by a vessel where cargo space was available because it was disclosed that the shipment was a shipment of caustic soda?

The Witness: Not on that basis, no.

Mr. Bensel: Not on what?

The Witness: Not on that basis.

The Court: What prompted you to say that it was difficult to arrange for cargo space for a shipment of caustic soda? What was difficult about it?

Charles J. Conlon—For Plaintiffs—Cross.

[147] The Witness: Well, the previous question, your Honor—

The Court: No, never mind about the previous question. What was difficult about arranging for cargo space for a shipment of caustic soda?

The Witness: At that time there was a lot of caustic soda being shipped and there were a lot of bookings made, and the steamship companies would limit themselves to a set tonnage that they could carry on that particular vessel. When that limit was reached they more or less cut down on that item, unless you could prevail upon them that in the event there was such space available they would take it.

The Court: Was that because caustic soda required special stowage in special portions of the ship?

The Witness: Yes, sir. It requires special stowage. They know what they can handle on each vessel and that is how they limit themselves.

By Mr. Bensel:

* * *

[148] Q. So that your answer is that they are reluctant to carry caustic soda or to book space for it? A. That's right, they are reluctant.

Q. And that was true in 1948 and prior to that date? A. That's right.

Q. You also said that stevedores are reluctant to handle the merchandise? A. That's right.

Q. Why? A. As I mentioned before, I mean, they can get burned from it, if the drums aren't in first-class condition. They consider it bad handling and they get extra pay.

[149] Q. If you can project yourself back to July and August of 1948, you testified that you were engaged in practically daily conversation with others in the shipping industry, and I suppose you talked at that time about the possibility of a National Maritime strike, is that right? A. That's right.

Q. Because of its impact or possible impact on your business? A. That's right.

Q. Did you know or learn at that time that negotiations were under way for settlement? A. Yes.

Q. And if you can project yourself back to that period, is it your recollection that you and the ones you spoke to were hopeful that a settlement would be effected? A. We were optimistic.

Q. You were optimistic all through that period right down to the date when the Pacific Coast strike actually commenced, isn't that so? A. That's right.

. . . .

[151] The Court: Do you know what the difference is between a voyage charter and a time charter?

The Witness: Yes, I know, a general knowledge of what a time charter and a voyage charter is.

Q. You say that you also inquire whether they are putting this boat into their own service, is that right? A. That's right.

Q. What do you mean by that? A. In their own regular run of vessels; in [152] other words the port that they usually serve.

Q. Do you inquire as to what type of charter it is, whether it is a bareboat charter of a time charter? A. Not necessarily, no.

Q. Do you ever make an inquiry of that type, as to the type of charter party between the parties, whether it is time or bareboat? A. No.

Q. Do you know what a bareboat charter is? A. Yes.

Q. What is it? What is a bareboat charter? A. A what?

Q. A bareboat charter. A. No, I don't know.

Q. You don't know? A. No.

Q. Do you inquire when you make these inquiries as to whose crew is operating the ship, that is, whether the owner's or the charterer's? A. More or less, if you know the owner of the boat, you know whose crew it is because they retain the same crew.

Q. Is that your understanding? A. Generally, yes.

Q. You just assume that, is that right, that the owner keeps his own crew aboard? [153] A. Well, on a voyage—

Q. You don't claim to know all the details and ramifications as to whose crew is aboard whose ship as between the owner and the charterer? A. No.

Q. You don't go into those details, do you? A. Generally we would know, as I said, if it is taken from another company, that company usually retains the crew.

Q. You just assume that, don't you? A. Yes.

Q. You don't ask anybody? A. No.

* * *

[154] Cross Examination by Mr. Scott:

* * *

[156] Q. You said something about information you had about an injunction under the Taft-Hartley Act in 1948. A. The information we had was generally known that there was going to be an injunction served to prevent the strike.

Q. That was general knowledge among the shipping agents and forwarders, wasn't it? A. That's right.

Q. And you went on with business as usual? A. That's right.

Charles J. Conlon—For Plaintiffs—Re-cross.
Cyril F. Powers—For Plaintiffs—Cross.

Q. You didn't make any changes in your business? A. No, we continued right along.

Q. And you didn't make any prophecies as to what would happen? A. We couldn't.

Q. You didn't know, did you? A. That's right.

Q. You didn't know whether it would be settled [157] or whether there would later be another strike? A. That's right.

Q. Did you know of anybody that did know? A. No, sir.

Q. In August of 1948? A. No, sir.

Q. You went on with business as usual? A. Yes, sir.

Q. And so did the other shipping people you knew? A. That's right.

* * *

[159] Re-cross Examination by Mr. Bensel:

* * *

[160] Q. But as you said to Mr. Scott a minute ago, in July and August business went on as usual? A. That's right.

Q. You didn't hold back any shipments because of any concern of a possible strike? A. No, sir.

* * *

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[174] CYRIL F. POWERS, called as a witness by plaintiffs, being first duly sworn, testified as follows:

* * *

[188] Cross Examination by Mr. Bensel:

Q. Mr. Powers, you have in effect testified here to the matters set forth in this letter that you wrote to your counsel dated September 2, 1954? A. Yes, sir.

Cyril F. Powers—For Plaintiffs—Cross.

Q. You remember that letter? A. Yes, sir.

Q. You refer there to certain movements of a ship known as the SS. Jane G. Swisshelm? A. Yes, sir.

Q. Between July 29th and September 3, 1948? A. Yes, sir.

Q. Now, what was the connection of Isbrandtsen with that boat? A. Bareboat charterers.

Q. Bareboat charterers? A. Yes, sir.

Q. When had it been chartered? A. I do not have the date, sir. It was about three voyages earlier, I believe.

Q. Now you testified that pursuant to the provisions of the so-called freight engagement contract that your agent, Hansen & Tidemann, made with Colorado, that there came a time when another vessel was substituted [189] for the SS. Swisshelm? A. Yes, sir.

Q. I think you said that was around the 17th or 18th of August? A. Approximately.

Q. Why was the substitution made? A. Because the Jane G. Swisshelm was not available.

Q. Available where? A. At the Port of New Orleans or in the vicinity.

• • •

[191] Q. This freight engagement contract with Colorado contains at the bottom portion of it a lot of small print and frankly my eyesight isn't good enough to catch it, particularly on a photostat, it is so small.

The Court: I will take my glasses off and then I can read it.

Q. But without attempting to go through this fine printed matter, it is a fact, is it not, that this is a firm agreement for the carriage of certain freight enumerated? A. Yes.

Mr. Dunn: I object to the question.

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Direct.

[192] The Court: Objection sustained. What it is is for me to say. You may ask him whether it is known in the trade as a commitment.

Mr. Bensel: Thank you, your Honor.

Q. Are these freight engagement contracts so-called understood and recognized in the trade as firm and binding? A. Subject to their terms.

Q. Subject to their terms? A. Yes.

Q. To wit, the right of the steamship company to substitute a vessel? A. And whatever printed terms are in the contract.

* * *

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[213] FREDERICK R. BECKER, Jr., called as a witness in behalf of Colorado Fuel and Iron Corporation, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bensel:

Q. Mr. Becker, where do you reside? A. In New Orleans, Louisiana.

Q. Are you connected with the Farrell Shipping Company? A. Yes, I am.

Q. In what capacity? A. As secretary-treasurer.

Q. And what is the business of Farrell Shipping Company? A. Freight brokerage and forwarding.

* * *

[214] Q. How long have you been connected with the Farrell Shipping Company? A. Since November, 1932.

* * *

Q. And one of your customers is Colorado Fuel and Iron? A. Yes.

* * *

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Direct.

[215] Q. Did there come a time in the summer of 1948 when your firm was requested by Colorado to book certain space for a shipment of caustic soda? A. Yes.

Q. To India? A. To Bombay, India.

Q. After you received that request did you set out to make arrangements for such a cargo to be shipped? A. That is correct. We canvassed the various lines in an effort to procure space.

• • •

Q. When you received this request, did you experience any difficulty in locating space?

• • •

[216] (Record read)

A. Yes, we did.

Q. Will you explain that? A. Well, space was very limited at that time to Indian ports. There was a very large demand for all types of cargoes and caustic soda is always a commodity that is difficult to book due to the nature of the material.

[217] Q. With whom did you make the arrangements for space for this merchandise? A. Well, we were finally successful in getting space from Isbrandtsen Steamship Company through their agents, Hansen & Tidemann.

Q. In New Orleans? A. Yes.

Q. And did you, on behalf of Colorado, enter into a freight engagement contract? A. We did.

Mr. Bensel: Your Honor, that has been offered in evidence and I am not going to take any time with that.

Q. That was on July 29th, wasn't it? A. I think that's correct.

• • •

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Direct.

[219] Q. Mr. Becker, is it and was it in 1948 the custom and practice in the Port of New Orleans for a freight forwarder, a broker, to inquire of the agents of a ship as to the type of charter in force in respect of the boat on which a customer's goods would be shipped?

Mr. Dunn: I object.
The Court: Overruled.

A. No, it is not customary. It has not been and it still is not.

• • • •

[224] Q. Prior to September 3, 1948, did you know that the S.S. Hawaiian was manned by a west coast crew? A. No, I did not.

Q. In these many years of experience that you have had in the freight forwarding business, have you ascertained in connection with the movement of a ship that various members of the crew belonged to different unions? A. No, we do not.

• • • •

Q. Well, did you know that in this country at least that the ship's officers have their own unions? A. Yes.

Q. And the crews have other unions? A. The crews have other unions.

Q. Did there come a time when you learned that the S.S. Hawaiian was strike-bound? A. Yes, we did learn of it.

[225] Q. From whom? A. From Hansen & Tidemann.

Q. When? A. I think it was September 3rd; I am not positive.

Q. Is that the first knowledge you had of it? A. Yes, after it had already occurred we heard of it.

• • • •

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Direct.

[232] Q. Prior to September 3rd had you received any information from any source, newspapers or otherwise, which indicated or reasonably led you to believe that the S.S. Hawaiian would not sail on the [233] 3rd of September? A. No.

Mr. Dunn: I am sorry, I did not get a chance to object to that.

The Court: If you move now to strike out the answer, your motion is denied and you have an exception.

Mr. Dunn: My motion is addressed to the word "reasonably" in the question, which calls for an expert's opinion rather than this witness's state of mind.

The Court: You may cross-examine him on that.

Did you receive any information which would lead you to the belief that the ship was not to sail on the scheduled date?

The Witness: No, sir, I did not.

[234] By the Court:

Q. Did anybody tell you that a strike was about to be declared by the crew aboard that ship? A. No.

Q. Do you know what union the members of that crew belonged to? A. No, sir, I did not.

By Mr. Bensel:

Q. Did you know what union the ship's officers belonged to? A. No, I did not.

Q. Prior to the first part of September, 1948, had your company continued to book space for clients and merchandise for delivery to a ship after September 1?

Mr. Dunn: That is objected to as irrelevant.

The Court: Overruled.

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Cross.

A. Yes, we definitely did. We continued with our bookings right along.

Q. In other words, is it fair to state that your firm and, to your knowledge, other firms similarly situated in New Orleans continued to do business as usual during these summer months of 1948? A. Correct, we continued to book our freight [235] as it is customary to do so.

Q. When you booked this shipment of caustic soda to India, what generally were the shipping conditions in New Orleans? Was it heavy or light? A. Movement was very heavy. Space was very scarce.

Q. Before you contacted Hansen & Tidemann, the agents of Isbrandtsen, did you approach any other line to see whether or not they could take this merchandise? A. Yes, we had, without success.

Q. What was that other line? A. Isthmian Steamship Company.

• • •

[236] Q. After you were advised by Hansen & Tidemann of the strike in connection with this vessel, did you communicate that information to your principal, Colorado? A. I don't recall whether we did it immediately or whether we didn't do it for about a week.

[237] Q. You testified in New Orleans that on the 7th of September you sent a telegram to Colorado advising them that the S.S. Hawaiian was strikebound? A. Then I am sure it is correct.

• • •

[245] Cross Examination by Mr. Scott:

• • •

[250] Q. This booking arrangement for 1000 tons which you made under date of July 29th was amended and extended to include additional tonnage? A. Yes, sir.

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Cross.

Q. At a later date? A. Right.

Q. Was that extension made after the substitution of the Hawaiian for the Swisshelm? A. Yes.

Q. So that at the time the extension was made you had knowledge of the substitution? A. What do you mean by extension? Do you mean the increase to 1500 tons?

Q. Yes, the increase. A. Yes, that's right. As I recall it, the increase was made about two days after advice of the substitution of the S.S. Hawaiian.

• • • •

[251] Q. The letters of credit, the credit arrangements, were not completed in time to get the cargo to New Orleans to make the original date in the booking agreement? A. That's right.

Q. Did you care what kind of a charter this was, whether it was bareboat charter or time charter? A. No, that wouldn't make any difference to us. [252] We are more concerned with the people with whom we are directly dealing, if we are dealing with reputable people.

Q. It made no difference to you whether the crew on the vessel was the crew of the ship's owner or the crew of the ship's charterer? A. Correct.

• • • •

[257] Q. Do you know who owns the S.S. Hawaiian? A. American-Hawaiian Steamship Company.

Q. Did you know that in August 1948? A. No.

Q. When did you first learn about it? A. I believe at the time of the strike. The information probably was available to me by referring to logs but it was just a routine matter and no consideration was given to it at the time.

Q. You mean by that that it made no difference to you? A. No, it made no difference to me.

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Cross.

Q. What is the answer? A. No, it made no difference to me.

The Court: When you say that it made no difference to you, you mean that when you were booking the cargo space it made no difference to you—

[258] The Witness: It made no difference to us who the owner of the ship was. We were doing business with Isbrandtsen.

The Court: And you relied on them as being a reliable company?

The Witness: Yes, sir. I am sorry I can't find any.

* * *

[261] Cross Examination by Mr. Tillinghast:

Q. Mr. Becker, when did you first learn that the Hawaiian was strikebound? A. On September 3rd.

Q. And you promptly informed your principals of that fact? A. No. we did not inform them of it until Septem-
[262] ber 7.

Q. Why did you delay until September 7th in informing them? A. Well, the situation was very unclear on September 3rd as to how long it was going to last. It was a temporary situation and we were trying to see how it would progress, and then, as I recall it, there was a long weekend occasioned by the Labor Day holiday. So it was the 7th of the month before we could get anything definite that the strike was apparently on and going to last.

Q. I show you—

Mr. Bensel: On the record, your Honor, we have checked. September 3rd was the Friday before Labor Day and the 7th was the Tuesday after Labor Day.

Frederick R. Becker, Jr.—For Defendant Colorado Fuel and Iron Corp.—Re-direct.

The Court: The Court will take judicial notice of that.

• • •

[286] Re-direct Examination by Mr. Bensel:

Q. When the substitution of the Hawaiian for the Swisshelm was made, Mr. Becker, was the date of shipside delivery changed? A. I believe it was.

• • •

[287] Q. Referring to the affreightment agreement marked in evidence here, what was the period of shipside delivery provided for? A. August 19th through August 25th. Mr. Bensel, here is a telegram on August 13th where we extended the delivery date until August 31st, and, as I recall it, there was a later one extending it to September 2nd.

• • •

[288] Q. I show you a document and see if that will refresh your recollection when you were told that the S. S. Hawaiian was due to arrive in New Oreleans. A. Yes.

Q. When? A. On August 28th we were told that the vessel expects to arrive at New Orleans on Tuesday, August 31st.

• • •

Q. Prior to September 3rd, regardless of whether American Hawaiian or Isbrandtsen had a crew aboard the ship, were you in a position to tell whether the strike would or would not occur? A. No, sir.

• • •

Ward Wire—For Defendant Colorado Fuel and Iron Corp.—Direct.

[292] WARD WIRE, called as a witness in behalf of the defendant Colorado Fuel and Iron Corporation, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bensel:

* * *

[293] Q. In connection with this shipment of caustic soda it originated in Ladora, Colorado, did it not? A. Yes.

Q. That is where your plant is? A. Well, that is where that particular plant is.

Q. Now, when did that caustic soda shipment start moving out of Ladora? A. I think about August 20th, and it was all shipped in a few days.

Q. It was all shipped in a few days? A. Yes, sir.

* * *

[294] Q. The evidence disclosed in this record is that Farrell Shipping sent to Colorado at Denver the ocean bills of lading. A. Yes, sir.

* * *

[295] Q. After they were received by Colorado, what was done with them? A. After they were received in our office of the Colorado, specifically in our export division, they are sent to the treasurer to draw drafts in accordance with the letters of credit.

Q. In other words, you have got to draw a draft first? A. Yes.

Q. In this case they were sent on from the treasurer's office in Colorado to the bank here in New York? A. The National City Bank here.

Q. When did you first hear about a strike involving this shipment? A. September—late September 7th or September 8th.

Ward Wire—For Defendant Colorado Fuel and Iron Corp.—Direct.

Q. When you received this telegram, which was marked here this morning as Exhibit C from Farrell, is that right? A. That's right; that's my first knowledge.

* * *

[296] Q. I show you Defendants' Exhibit D. That was a letter received in your office— A. Yes, sir. There is my notation on it referring it to the treasurer and the note that I read the letter at the time.

Q. And after the receipt of that letter, Exhibit D, was a copy of it sent to the export office of Colorado here in New York? A. Yes, sir.

Q. When was the copy sent? A. I don't know the date, but immediately after receiving the letter.

Q. I show you this document and see if that refreshes your recollection. A. That is my copy of my communication.

Q. Forwarding a copy of this letter, Exhibit D? A. Yes.

[297] Q. You sent a copy of this letter to the New York export office under date of September 15th, is that right? A. If that is the date, yes.

Q. Well, look at that and tell me if that is correct. A. (After examining) Yes, sir.

Q. Prior to September 3rd or September 7th did you know what kind of a crew was aboard the S.S. Hawaiian? A. I knew nothing about the crew or the charter or anything else. All I knew I had confirmed booking for a certain tonnage on the boat.

Q. Was all of the caustic soda that you shipped by rail from Ladora, Colorado, put aboard the S.S. Hawaiian? A. It was.

* * *

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Re-cross.

[317] MATTHEW S. CRINKLEY, called as a witness by defendant Isbrandtsen Company, Inc., being first duly sworn, testified as follows:

* * *

---

[349] SIGUARD E. SIMPSON, JR., called as a witness by defendant Isbrandtsen Company, Inc., being first duly sworn, testified as follows:

* * *

[375] Re-cross Examination by Mr. Dunn:

* * *

[388] By the Court:

Q. After you received word of a strike you went over to the vessel, you said. A. That's right.

Q. What time did you get there? A. It takes about 45 minutes to get over there. That is on the other side of the river, sir.

[389] Q. Were the winches working when you got there? A. No, sir, everything was completely quiet, all of the longshoremen gone, everybody gone.

Q. How long did you stay there? A. Oh, possibly an hour.

Q. In that time was there any cargo taken aboard? A. No, sir.

Q. Was the ship still tied to the wharf? A. Yes, sir.

Q. Did you notice whether there was any cargo on the wharf? A. Yes, sir.

Q. Did you notice what that cargo was? A. Yes, sir.

Q. Tell us what you saw on the wharf. A. The trucks that were still remaining on the wharf, and I did know that all the caustic soda—

Plaintiffs' Exhibit 1 (In Part).

Q. Tell us what you saw on the wharf. A. I saw the vehicles that were remaining on the wharf.

Q. What else? A. That's all, sir.

Q. Did you see any drums of caustic soda on the wharf? A. No, sir.

The Court: All right.

Plaintiffs' Exhibit 1 (In Part).

(Stipulation)

[972]

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties hereto that:

1. The documents which are attached hereto as "schedules" with alphabetical designation are hereby admitted to be true and correct copies of the documents respectively designated and described below;

• • •

3. Any facts stated below with respect to any described document are also deemed to be admitted for all purposes in this action;

• • •

[973] 6. The said documents are as follows:

• • •

"SCHEDULE C": Cablegram sent by said National City Bank, New York Branch, to said National City Bank, Bombay Branch, on August 4, 1948 at the request of The Colorado Fuel and Iron Corporation.

• • •

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

"SCHEDULE E": Cablegram sent by said National City Bank, New York Branch, to said National City Bank, Bombay Branch, on August 5, 1948, at the request of The Colorado Fuel and Iron Corporation, the contents of which were communicated to plaintiffs, and the phrase "without responsibility" being admitted to mean "without responsibility to The National City Bank of New York."

"SCHEDULE F": Cablegram sent by said National City Bank, Bombay Branch, to said National City Bank, New York Branch, on [974] August 6, 1948, the contents of which were communicated to The Colorado Fuel and Iron Corporation and the phrase "Mulkraj regrets" therein contained being admitted by plaintiffs to be true.

* * *

[975] "SCHEDULE Q": Cablegram from Laxmansons, Lucknow, to W. A. Bartle care Colorado Fuel and Iron Corporation, 1616 Eye Street, Washington, D. C. sent and received August 11, 1948.

* * *

"SCHEDULE U": Cablegram from Laxmansons, Lucknow, to W. A. Bartle care Colorado Fuel and Iron Corporation, 1618 Eye Street, Washington, D. C., sent and received August 12, 1948.

* * *

[976] "SCHEDULE W": Cablegram from Colorado Fuel and Iron Corporation, New York, to Mulkraj Brothers & Badhwar care of Citibank, Bombay, sent August 13, 1948 and received August 14, 1948.

"SCHEDULE X": Cablegram from Laxmansons to Colorado Fuel and Iron Corporation, 1616 Eye Street, Washington, D. C., sent August 17, 1948 and received August 18, 1948.

* * *

"SCHEDULE Z": Letter of credit dated August 19, 1948, numbered 86897, issued by The National City Bank of New

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

York at New York in favor of W. A. Bartle care Colorado Fuel and Iron Corporation, 1616 Eye Street, Washington, D. C. for the sum of $239,000.00 for the account of Mulkraj Brothers and Badhwar, Lucknow, and received by Colorado Fuel and Iron Corporation on August 19, 1948.

• • •

"SCHEDULE AC": Amendment dated August 25, 1948 of The National City Bank of New York to its letter of credit No. 86897, changing beneficiary thereof to Colorado Fuel and Iron Corporation instead of W. A. Bartle, which amendment was confirmed in writing as acceptable by W. A. Bartle on August 25, 1948 and by The Colorado Fuel and Iron Corporation on August 27, 1948.

• • •

[977] "SCHEDULE AH": Letter of credit dated August 26, 1948, numbered 87723, issued by The National City Bank of New York at New York in favor of Colorado Fuel and Iron Corporation, 500 Fifth Avenue, New York, N. Y. for the sum of $186,600.00 for the account of R. S. Dass Badhwar, care Mulkraj Brothers and Badhwar, Lucknow and received by Colorado Fuel and Iron Corporation on August 26, 1948.

• • •

[978] "SCHEDULE AM": Sight draft, dated September 7, 1948 and numbered 1838, drawn by The Colorado Fuel and Iron Corporation on Mulkraj Brothers and Badhwar, Lucknow, India, for the sum of $212,743.67 under The National City Bank of New York, Bombay Credit 14937, containing the words "DRAWN AS PER ADVICE CCF 86897, August 19, 1948, and Amendment of August 25, 1948" ("SCHEDULES Z and AC", respectively), the original of which bore the duly authorized signature of the Cashier and the duly authorized countersignature of an officer of The Colorado Fuel and Iron Corporation, and which said

original sight draft, accompanied by the signed invoice in triplicate described in "SCHEDULE AN", by all negotiable copies of the on board ocean bill of lading described in "SCHEDULE AO" and by copies of the certificate of marine insurance in negotiable form described in "SCHEDULE AP", was presented by The Colorado Fuel and Iron Corporation at the office of The National City Bank of New York, 55 Wall Street, New York 15, N. Y., on or about September 7, 1948, and was thereafter honored by said bank by the payment to The Colorado Fuel and Iron Corporation on or about September 13, 1948, of the sum of $212,743.67.

"SCHEDULE AN": Invoice of The Colorado Fuel and Iron Corporation, dated August 25, 1948 and signed by H. C. Crout, Treasurer, to Mulkraj Brothers & Badhwar, Lucknow, India, drawn for the sum of $212,743.67 for 3,217 drums of caustic soda 76% solid (N.Y.&L.) containing 2,239,407 net pounds or 999.73 gross tons.

"SCHEDULE AO": Negotiable on board ocean bill of lading, No. 144 1948, dated at New Orleans, La., September 3, 1948, issued to The Colorado Fuel & Iron Corporation, as shipper, and made out to the order of The National City Bank of New York, New York City, [979] N. Y., or assigns, as consignee, for 3,217 drums of caustic soda 76% solid (N.Y.&L.) marked MULKRAJ LUCKNOW VIA BOMBAY Nos. 1/3217 MADE IN USA, stamped freight prepaid and designating the ship as the S/S Hawaiian the port of loading as New Orleans, Louisiana, and the port of discharge from ship as Bombay, India.

"SCHEDULE AP": Certificate of marine insurance in negotiable form in the amount of $234,018.00, dated September 7, 1948 and bearing No. N 900373, issued by the Insurance Company of North America to Colorado Fuel & Iron Corporation, covering 3,217 New Steel Drums of Caustic

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

Soda Solid, 2,239,407 lbs. net, to be shipped by the vessel Hawaiian, and connecting conveyances, from Ladora, Colorado via New Orleans, Louisiana, to Bombay, India.

"SCHEDULE AQ": Sight draft, dated September 7, 1948 and numbered 1839, drawn by The Colorado Fuel and Iron Corporation on RS Dass Badhwar care Mulkraj Brothers and Badhwar, Lucknow, India, for the sum of $104,631.86 under The National City Bank of New York, Bombay Credit, 15058, containing the words "DRAWN AS PER ADVICE CCF 87723, August 26, 1948" ("SCHEDULE AH"), the original of which bore the duly authorized signature of the Cashier and the duly authorized countersignature of an officer of The Colorado Fuel and Iron Corporation, and which said original sight draft, accompanied by the signed invoice in triplicate described in "SCHEDULE AR", by all negotiable copies of the on board ocean bill of lading described in "SCHEDULE AS" and by copies of the certificate of marine insurance in negotiable form described in "SCHEDULE AT", was presented by The Colorado Fuel and Iron Corporation at the office of The National City Bank of New York, 55 Wall Street, New York 15, N. Y., on or about September 7, 1948, [980] and was thereafter honored by said bank by the payment to The Colorado Fuel and Iron Corporation on or about September 13, 1948, of the sum of $104,631.86.

"SCHEDULE AR": Invoice of The Colorado Fuel and Iron Corporation, dated Auugst 29, 1948 and signed by H. C. Crout, Treasurer, to RS Dass Badhwar care Mulkraj Brothers & Badhwar, Lucknow, India, drawn for the sum of $104,631.86 for 1582 drums of caustic soda 76% solid (N.Y.&L.) containing 1,101,388 net pounds or 491.69 gross tons.

"SCHEDULE AS": Negotiable on board ocean bill of lading No. 145 1948, dated at New Orleans, La., September

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

3, 1948, issued to The Colorado Fuel & Iron Corporation, as shipper, and made out to the order of The National City Bank of New York, New York City, N. Y., or assigns, as consignee, for 1582 drums of caustic soda 76% solid (N.Y.&L.) marked MULKRAJ LUCKNOW VIA BOMBAY Nos. 3218/4799 MADE IN USA, stamped freight prepaid, and designating the ship as the S/S Hawaiian, the port of loading as New Orleans, Louisiana, and the port of discharge from ship as Bombay, India, the multilated portion of which is admitted to be identical to the corresponding unmultilated portion of the ocean bill of lading annexed as "SCHEDULE AO."

"SCHEDULE AT": Certificate of marine insurance in negotiable form in the amount of $115,094.00, dated September 7, 1948 and bearing No. N 900376, issued by the Insurance Company of North America to Colorado Fuel & Iron Corporation, covering 1,582 New Steel Drums of Caustic Soda Solid, 1,101,388 lbs. net, to be shipped by the vessel Hawaiian, and connecting conveyances, from Ladora, Colorado via New Orleans, Louisiana, to Bombay, India.

• • •

[985] Dated, New York, N. Y., November 30, 1950.

DUNN & ZUCKERMAN

By: JAMES F. DUNN
Attorneys for Plaintiffs

RATHBONE, PERRY, KELLEY & DRYE

By: FRANCIS S. BENSEL
Attorneys for Defendant
The Colorado Fuel and Iron Corporation

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

SCHEDULE C.

[988]

REFER YOUR 9 CAUSTIC SODA • • • PLEASE CONTINUE ENDEAVOR AROUSE INTEREST FOR ALL OR PART 4,300 TONS AND CABLE RESULTS.

SCHEDULE E.

[990]

YOUR ELEVEN COLORADO STATE THEIR BEST PRICE CAUSTIC SODA QUALITY EQUAL NINETY-EIGHT PERCENT NOAH SUBJECT TO PRIOR SALE FOR IMMEDIATE ACCEPTANCE IS TEN CENTS PER POUND CIF BOMBAY WITHOUT RESPONSIBILITY.

SCHEDULE F.

[991]

YOUR NINE MULKRAJ REGRETS STOP SO FAR NO OTHER INTEREST CONTACTS SAYING NEW YORK MARKET CENTS 9.50 CIF BOMBAY STOP.

SCHEDULE Q.

[1003]

• • •

CONTINUATION OUR CABLE 9th AUGUST PLEASE DISPATCH CAUSTICSODA BOMBAY INSTEAD CALCUTTA STOP IMPORT LICENSES NUMBERS 416/48 AND 9380/48 TREAT PREVIOUS IMPORT LICENSE GIVEN CANCELLED

• • •

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

SCHEDULE U.

[1007]

. . .

LETTER CREDIT YOUR FAVOUR ESTABLISHED TODAY FOR 239000 DOLLARS AGAINST IMPORT LICENSE NUMBER 9380/48 BALANCE WILL BE ESTABLISHED WITHIN WEEK

. . .

SCHEDULE W.

[1009]

. . .

ADVISE NAME NEWYORK BANK ARRANGING LETTER CREDIT STOP ABSENCE SUCH INSTRUCTIONS MAY DELAY SHIPMENT CABLE REPLY WICKSPEN NEWYORK

. . .

SCHEDULE X.

[1010]

. . .

LETTER CREDIT 2000 TONS CAUSTICSODA ESTABLISHED YOUR FAVOUR THROUGH NATIONAL CITY BANK OF NEWYORK

. . .

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

SCHEDULE Z.

[1012]

THE NATIONAL CITY BANK OF NEW YORK
55 Wall Street
New York 15, N. Y.

Rec'd Aug 19 1948
New York August 19, 1948

Confirmed irrevocable straight credit

WA BARTLE Care COLORADO FUEL AND IRON CORPORATION
1616 Eye Street
Washington D.C.

All drafts drawn must be marked:
Drawn as per advice CCF

86897

Dear Sirs:

We are instructed by The National City Bank of New York, Bombay, India to advise you that they have opened their irrevocable credit in your favor for account of Mulkraj Brothers and Badhwar Lucknow under their credit No. 14937 for a sum or sums not exceeding a total of $239,000.00 (Two Hundred Thirty Nine Thousand Dollars) available by your drafts at sight on Mulkraj Brothers and Badhwar Lucknow for full invoice cost without recourse payable at our office for face amount upon presentation marked drawn under The National City Bank of New York Bombay, Credit 14937. To be accompanied by: Your signed invoice in triplicate certifying merchandise to be of United States origin. Invoices are to include the amount of freight prepaid and may include the amount of insurance premium.

Full set on board ocean bills of lading showing freight prepaid and made out to the order of The National City Bank of New York and/or to order and blank endorsed dated latest October 10, 1948, all negotiable copies required. Through railway bills of lading are unacceptable.

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

Marine insurance policies or certificates of insurance in negotiable form WPA including theft pilferage non-delivery and with customary warehouse to warehouse clause including risk of fire for a period of at least ten days after landing on wharves and/or wharf sheds and/or wharf warehouse at port of destination unless previously warehoused by consignee or party at interest. War risk insurance required. Evidencing shipment of one thousand tons caustic soda from U. S. ports to Bombay in one or more shipments.

Except as otherwise expressly stated herein, this advice is subject to the "Uniform Customs and Practice for Commercial Documentary Credits" (fixed by the Seventh Congress of the International Chamber of Commerce) and to the relative guiding provisions, all as adopted by certain banks and other concerns in the U. S. of A.

The above mentioned correspondent engages with you that all drafts drawn under and in compliance with the terms of this credit will be duly honored on delivery of documents as specified if presented at this office on or before October 25, 1948. We confirm the credit and thereby undertake that all drafts drawn and presented as above specified will be duly honored by us.

Yours very truly,

THE NATIONAL CITY BANK OF NEW YORK
(Illegible)

Stringent Indian imports regulations make it extremely inadvisable to consider shipping more than the quantity specified without having credit amended, even if credit amount is sufficient to cover.

Com. 511 5 Parts Rev. Oct 41
S. C.

AAM/JM

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

SCHEDULE AH.

[1021]

THE NATIONAL CITY BANK OF NEW YORK
55 Wall Street
New York 15, N. Y.

New York August 26, 1948

Confirmed irrevocable straight credit

COLORADO FUEL AND IRON CORPORATION
500 Fifth Avenue
New York, New York

All drafts drawn must be marked:
Drawn as per advice CCF
87723

Dear Sirs:

We are instructed by The National City Bank of New York, Bombay, India to advise you that they have opened their irrevocable credit in your favor for account of RS Dass Badhwar care Mulkraj Brothers and Badhwar Lucknow under their credit No. 15058 for a sum or sums not exceeding a total of $186,600.00 (One Hundred Eighty Six Thousand Six Hundred Dollars) available by your drafts at sight on RS Dass Badhwar care Mulkraj Brothers and Badhwar Lucknow for full invoice cost without recourse payable at our office for face amount upon presentation marked drawn under The National City Bank of New York, Bombay Credit, 15058. To be accompanied by: Your signed invoice in triplicate certifying merchandise to be of United States origin. Invoices are to include the amount of freight prepaid and may include the amount of insurance premium.

Plaintiffs' Exhibit 1 (In Part).
Stipulation.

Full set on board ocean bills of lading showing freight prepaid and made out to the order of The National City Bank of New York and/or to order and blank endorsed, dated latest September 22, 1948, all negotiable copies required. Through railway bills of lading are unacceptable.

Marine insurance policies or certificates of insurance in negotiable form W.P.A. including theft pilferage non-delivery and with customary warehouse to warehouse clause including risk of fire for a period of at least ten days after landing on wharves and/or wharf sheds and/or wharf warehouse at port of destination unless previously warehoused by consignee or party at interest. War risk insurance required. Evidencing shipment of caustic soda from U. S. ports to Bombay in one or more shipments.

Except as otherwise expressly stated herein, this advice is subject to the "Uniform Customs and Practice for Commercial Documentary Credits" (fixed by the Seventh Congress of the International Chamber of Commerce) and to the relative guiding provisions, all as adopted by certain banks and other concerns in the U. S. of A.

The above mentioned correspondent engages with you that all drafts drawn under and in compliance with the terms of this credit will be duly honored on delivery of documents as specified if presented at this office on or before October 7, 1948. We confirm the credit and thereby undertake that all drafts drawn and presented as above specified will be duly honored by us.

Yours very truly,

THE NATIONAL CITY BANK OF NEW YORK
(Illegible).

Com. 511 5 Parts Rev. Oct 41
S.C.

AAM/JM

Plaintiffs' Exhibit 4 (In Part).

(Dalton Deposition)

• • •

(3 [593]) JOHN HANSEN DALTON called by and on behalf of the plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

• • •

(4 [594]) Cross Examination Mr. Dunn:

• • •

(5 [595]) Q. Prior to the formation of the firm, you have just mentioned, what was your occupation or position? A. Steamship agent.

Q. Were you then with Hansen & Tidemann, Inc.? A. That's correct.

• • •

Q. And what was your position with Hansen & Tidemann, Inc. in 1948? A. I was a vice-president and secretary.

• • •

(77 [667]) Q. And the stevedoring company was acting for the ship? A. For the ship.

Q. Owner or operator? A. That is right.

Q. To your knowledge did Colorado Fuel & Iron Corporation or Farrell Shipping Company give any instructions as to how and when the caustic soda should be loaded aboard the S/S Hawaiian? A. Not at all. To the best of my recollection it would be most extraordinary if something like that happened.

Q. Whether it was extraordinary or not, did it happen in this case to your knowledge? A. I do not recall it happening, to my knowledge.

Q. In other words, the arrangements for the placement of the drums of caustic soda was within the control of either your company or the operator-owner of the ship? A. That is correct.

• • •

Plaintiffs' Exhibit 4 (In Part).

(Smith Deposition)

(111 [701]) ROBERT T. SMITH called by and on behalf of the plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

Direct Examination Mr. Dunn:

Q. Mr. Smith, what is your present occupation or position? A. I am president of the Standard Stevedoring Company, Inc.

• • •

(112 [702]) Q. Very briefly, would you tell us the function of a stevedoring company in the Maritime Industry? A. Well, the principal function of a stevedoring company is to discharge and/or load vessels with miscellaneous cargoes.

• • •

(131 [721]) Was the loading at Westwego completed in that one operation or was it interrupted in an incomplete state? A. You have reference to all of the cargo to be loaded by the vessel at Westwego Terminals?

(132 [722]) Q. At Westwego only? A. Before shifting to the other berths?

Q. Yes. A. Yes, the loading was interrupted by the walkout of the crew before all of the boxed automobiles were on board.

• • •

Q. What was it that occurred that actually caused you to stop? A. What actually caused us to stop was the ship's steam being turned off.

• • •

Plaintiffs' Exhibit 4 (In Part).
Robert T. Smith—For Plaintiffs—Cross.

(137 [727]) Cross Examination Mr. Bensel:

• • •

(138 [728]) Q. And to the best of your recollection, was the cargo stowed substantially in accordance with that plan? A. I don't recall the captain making any objections to the proposed stowage, that plan that we presented to him.

Q. So, your best recollection is that it was substantially carried through? A. Yes, for the cargo that was loaded, yes, sir.

• • •

Mr. Tillinghast:

• • •

(140 [730]) Q. If the cargo were not on the pier at the time you commenced loading, what would you have done to make sure that there was cargo there and that the loading wouldn't be interrupted by reason of unavailable cargo? A. In the case of the HAWAIIAN, the caustic soda, if I recall, for Bombay, the last port, and it being a heavy cargo, we naturally would stow that in the lower holds for stability reasons and we would designate a certain number of tons to go into each hold. If all the caustic soda was available, we would naturally stow it all in the lower holds first and then come on top of the caustic soda with the boxed automobiles.

• • •

(141 [731]) Q. Did the Farrell Shipping Company have anyone on the pier to make sure this shipment was at ship's side? A. I don't recall and I don't believe that he did; that's not the normal practice.

• • •

(142 [732]) Q. I think the record shows that loading cargo was interrupted by the strike at 10:00 A.M. on September 3? A. Yes.

Plaintiffs' Exhibit 4 (In Part).
Frederick Becker—For Plaintiffs—Direct.

Q. Did you load at that time all of the cargo to be loaded at Westwego? A. Not all of the cargo.

Q. A portion of it remained on the dock? A. That's correct.

Q. All the caustic soda had been loaded? A. That's true.

Q. Did you resume loading at Westwego the balance of the cargo at any time? A. After the strike was over, we, if my memory serves me correctly, completed loading the boxed automobiles which had been left on the wharf.

(Becker Deposition)

(174 [764]) FREDERICK BECKER, JR. called by and on behalf of the Plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

Direct Examination Mr. Dunn:

* * *

(176 [766]) Q. Do you recall whether you had any difficulty engaging shipping space for that shipment of caustic soda? A. Yes, I remember it quite well. It was extremely difficult at that time to secure freight space and particularly for caustic soda.

* * *

(179 [769]) Q. In trying to find a boat, what did you do? A. On this particular shipment?

Q. Yes. A. Well, as I recall it, we contacted the regular steamship companies operating in the conference to India, which, I believe, at the time, were Isthmian Steamship Company and the Kerr Steamship Company, agents for the Silver Java Line.

Q. Did you make any shipping commitments with Isthmian and/or Kerr? A. No, they had no space at the time for caustic soda.

Plaintiffs' Exhibit 4 (In Part).
Frederick Becker—For Plaintiffs—Direct.

Q. What did you do then? A. To the best of my memory, we then canvassed the market to see what other vessels may be available with other operators of vessels, whether in or out of the conference.

Q. What did you find with respect to Isbrandtsen vessels? A. Well, as I recall it at the time, we contacted Hansen & Tidemann, who was also interested in any large parcel in any direction, as a nucleus of cargo to submit to their principals, Isbrandtsen Steamship Company, and eventually, if my memory is correct and which my file, I am sure, will bear me out, we were offered a booking (180 [770]) or a vessel by the Isbrandtsen Steamship Company through their agent here.

• • •

(186 [776]) Q. Any evidence of the dates on which it was shipped from Ladora? A. Yes, we have copies of bills of lading on various cars indicating the supposed shipping date, at least indicating the date on which the railroad received the cars.

Q. Would you give us those dates, please? A. Well, there are various dates and numerous cars. (Checks files.) I would say that inland ladings have a range of dates from August 20 through August 27, 1948, Ladora, Colorado.

• • •

(189 [779]) Q. What did you do about the additional tonnage over 1,000 tons, for example? A. Again, I will have to study the file. I do not recall the detail of it. (Examines file.) On August 19th we telegraphed the Colorado Fuel & Iron Corporation confirming the total of 1,500 tons to Bombay. There is nothing in the file to indicate when or how the request came to us: possibly by telephone.

• • •

Q. I show you the paper marked Defendants' Exhibit-B

and ask you if that is a typewritten copy of the contract you made at that time? A. That is a true copy of the contract in my possession.

• • •

(194 [784]) Q. What cable are you referring to now? A. I am still referring to this one of August 17th. When we referred to 750 tons each, two steamers, October, we were referring to caustic soda.

Q. Would you read that entire cable into the record?

Mr. Tillinghast: It is a telegram.

A. It is addressed to Colorado Fuel, Mr. Griffith, "OUR WIRE TODAY ISBRANDTSEN NOW ADVISES AMERICAN STEAMER HAWAIIAN LATER SHIP'S SIDE DELIVERY NEW ORLEANS SEPTEMBER 2ND. WILL LOAD YOUR THOUSAND TONS CAUSTIC SODA BOMBAY.

TELEGRAPH IF DELIVERY WILL BE ACCOMPLISHED STOP ALSO TELEGRAPH IF YOU ACCEPT ISTHMIAN LINES OFFER TWO STEAMERS 750 TONS EACH DURING OCTOBER."

• • •

(202 [792]) Q. Did you arrange the necessary documents for the delivery of the goods from the railroad for boat loading? A. Yes, we prepared delivery orders, had them approved by the steamship company and had them mailed or delivered to the railroad.

• • •

(209 [799]) Cross Examination Mr. Bensel:

• • •

(211 [801]) Q. On direct examination you testified that you sent to Colorado two full receipts of bills of lading

Plaintiffs' Exhibit 4 (In Part).
Frederick Becker—For Plaintiffs—Re cross.

with a letter dated September 1, 1948? A. That is correct.

Q. Will you produce that letter, or a copy of it? A. Very well (producing document).

Mr. Bensel: I ask that this letter be marked for identification, "Defendants' Colorado-I."

(The document referred to was marked "Defendants' Exhibit-I" for identification.)

Q. Referring to this Exhibit-"I" that has just been marked, was that letter mailed on the date that it bears? A. I would say no. The reason I say no is because the bills of lading are not dated until a later date. Therefore, I could not possibly have mailed it on September 1st.

Q. The copies of the bills of lading that have been marked in this case as "Plaintiffs' Exhibit-F and H" bear a date of September 3, 1948? A. That is right.

Q. When did you receive those bills of lading from Hansen & Tidemann? A. On September 3rd, I feel sure.

Q. And when did you send them, with the letter, Exhibit "I"? A. We would have mailed them immediately, the same day.

(212 [802]) Q. To-wit, September 3rd? A. That is right.

Q. Can you explain why the letter bears the date September 1st? A. Yes. In our office we always try to work ahead, and in doing so we often date our letters the date we anticipate the document will be ready for transmittal. We are very busy and we cannot afford to have too large an organization. Therefore, whenever we have an opportunity we work ahead. We customarily try to change the dates, but apparently in some cases it was overlooked.

• • •

(218 [808]) Re-cross Examination Mr. Scott:

• • •

(220 [810]) Q. I believe you stated in your direct ex-

amination that this was the only vessel, the S/S HAWAIIAN, was the only vessel available in which this cargo of caustic soda could be shipped at that time? A. That is correct.

• • •

(221 [811]) Mr. Tillinghast:

• • •

(222 [812]) Q. You stated when you received this order you canvassed the steamship companies and the trade? A. That is right.

Q. To try to obtain space on their vessels? A. Yes, sir.

Q. You also stated that Isthmian Lines and the Silver Line, the Kerr Line, that is, declined to give you space for caustic soda? A. That is speaking from my memory, of course.

• • •

Q. Why didn't they want to carry caustic soda? A. For one thing, shippers of caustic soda were experiencing (223 [813]) extreme difficulty in obtaining ship license for caustic soda; another thing, caustic soda cannot be loaded into a vessel mixed with other certain types of cargoes, for instance, a vessel carrying edibles for obvious reasons.

• • •

Q. Do you know if its caustic nature has anything to do with it? A. No, I don't, but I assume that it would become caustic is very erosive. It will eat; the slightest dampness will cause it to start eating through its containers.

Q. Its own containers. Isn't that a fact? A. Yes, sir.

• • •

Plaintiffs' Exhibit 4 (In Part).

(Defendants' Exhibit B)

[880]

HANSEN & TIDEMANN, INC.
Steamship Agents - Ship Brokers
U. S. Gulf Ports

Contract No. NO-25

COLORADO FUEL & IRON CORPORATION New Orleans, Louisiana, July 29, 1948

c/o FARRELL SHIPPING COMPANY

This confirms engagement, made this day, of freight room, as follows ONE THOUSAND (1,000) TONS CAUSTIC SODA IN DRUMS

From the port of NEW ORLEANS, LOUISIANA to the port of BOMBAY, INDIA at the rate of $21.50 per 2,240# Freight Prepaid

Shipment per American SS JANE G. SWISSHELM or other A-1 vessel.

To be delivered as required by Hansen & Tidemann, Inc. AUGUST 19-25, 1948

• • •

ISBRANDTSEN COMPANY, INC
HANSEN & TIDEMANN, INC., AGENTS.

By (Original signed) S. E. SIMPSON

.....
Shipper.

Broker: FARRELL SHIPPING COMPANY

Plaintiffs' Exhibit 4 (In Part).

(Defendants' Exhibit I)

[889]

September 1, 1948

The Colorado Fuel and Iron Co.
P. O. Box 1920
Denver, Colorado

Attention: Miss Kneiszel

Gentlemen:

As per your instructions we herewith attach two full sets of bills of lading covering caustic soda loaded aboard the S. S. "HAWAIIAN" destined Bombay.

We also attach bill for our forwarding fee, for which please let us have check at your convenience.

Very truly yours,

FARRELL SHIPPING COMPANY, INC.

FRB:W

Plaintiffs' Exhibit 4 (In Part).

(14 [907]) *New Orleans Item, Tuesday, June 15, 1948—Page 15*

EDITORIAL COLUMN HEAD: STRIKE DEFERRED

In view of the recent widespread wage agreements in the nation's basic industries, disruption of our country's maritime commerce by a shipping strike would have been nothing short of calamitous.

• • •

Thus it is especially encouraging to reflect that once more the T-H Law has served to ward off an industrial deterioration that might have proved disastrous.

• • •

It must be remembered, however, that actually a (15 [908]) general port strike is now merely deferred. An injunction was issued by a federal court in New York at the request of a presidential fact-finding board. Under its terms, the threatened walk-out of maritime union workers has been forbidden for eighty days.

But in most cases of such work-stoppages, an agreement is struck before eighty days elapse. The exceptions have been few and far between. Hence it is more likely that before September 2—which happens to be Labor Day, incidentally—all disputes between the shipping industry and the six maritime unions can be composed through the orderly processes of discussion.

• • •

Plaintiffs' Exhibit 4 (In Part).

(Transcript of Newspaper Stories Re 1948 Maritime Strike)

(44 [937]) *New Orleans States, August 18, 1948—Page 3*

Column Head: AVERT STRIKE THREAT IN PACT WITH SEAMEN

(The AP)

New York—A threatened strike of 60,000 CIO seamen was staved off early today by an agreement with 42 Atlantic and Gulf Coast shipping companies for retention of "Union hiring halls" and for pay increases.

• • •

The agreement—subject to ratification by the union membership—was reached at 2:15 A. M. EST, after an 11-hour session of negotiating by committees of the NMU and the ship owners.

• • •

Plaintiffs' Exhibit 6 (In Part).

(Morgan Deposition)

(3 [1196]) LOUIS B. MORGAN, residing at 10 W. Maple Drive, New Hyde Park, New York, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Dunn:

Q. Mr. Morgan, what is your present position with Colorado Fuel and Iron Corporation? A. My present position is that of export manager.

Q. How long have you been with Colorado Fuel? A. I would say about seventeen or eighteen years.

Q. What was your position with them in 1948? A. My position in 1948, prior to October 21, was that of administrative assistant.

Plaintiffs' Exhibit 6 (In Part).
Louis B. Morgan—For Plaintiffs—Direct.

Q. You were administrative assistant to whom, and in what department? A. The Export Department; and I was administrative assistant to the export manager.

Q. What was his name, please? A. Mr. Matt Rosse.

Q. Mr. Rosse is now deceased? A. That is correct.

• • •

(12 [1205]) Q. Did you have anything whatever to do with a caustic soda sale to an Indian firm known as Mulkraj Brothers and Badhwar in the summer of 1948? A. I didn't have anything to do with the actual sale of it.

Q. What part of it did you work on, if any? A. To the best of my recollection, I was brought into (13 [1206]) the picture in about late August 1948, just prior to Matt Rosse, the export manager, going on vacation, and, in the interest of reviewing the letter of credit, taking care of other matters pertaining to that transaction, I took over for the two weeks that he was away as a clearing house, you might say, as a kind of intermediary.

• • •

A. Well, in reviewing my files, it would appear that I got into it after August 20, 1948.

Q. After August 20 and prior to what date? In other words, state the date as nearly as you can. (14 [1207]) A. The 25th.

Q. Sometime between the 20th and the 25th; is that your best recollection? A. That is right.

• • •

(28 [1221]) Q. Did you know the vessel on which the shipment was to proceed? A. No, I did not know until some time later. I don't know what time we are talking about

Plaintiffs' Exhibit 6 (In Part).
Louis B. Morgan—For Plaintiffs—Cross.

here, because in the beginning, I did not know, when I took it over. As things progressed and as the insurance company brought up certain questions, the name of the vessel became known to me at that time.

Q. Did you know the ownership of that vessel? A. No, sir.

Q. Did you at any time during this period have knowledge of any maritime strike or threatened strike in the United States? A. To the best of my recollection, I did not.

Q. Did anybody tell you about any strike situation that might affect shipments? A. No, sir, not to my recollection.

Q. Did you learn anything about any such strike situation from your examination of the files? A. In reading over the files, I did, yes. I knew about the strike situation after it had occurred, obviously, it became common knowledge at that time.

* * *

(40 [1233]) Cross-Examination by Mr. Tillinghast:

* * *

(51 [1244]) Q. You stated that the strike had been in progress when you first learned about it. Do you know how long it had been in progress? A. I received a letter from—I or Matt Rosse—received a letter from the traffic department, which I believe was dated September 7, informing us that a strike was in progress.

* * *

(52 [1245]) Q. Did you insure this shipment under a master policy, an open policy? A. That was covered under, I believe it is, a master policy, yes.

* * *

Plaintiffs' Exhibit 6 (In Part).
Louis B. Morgan—For Plaintiffs—Cross.

(53 [1246]) Q. When this shipment was being discussed with your Denver office, did you receive any communications forecasting the possibility that there might be a strike on the ocean steamships? A. I did not.

Q. Does your file contain any notice to that effect? A. My file contains no notice to the effect of any forthcoming or possible strike.

(54 [1247]) Q. And you state that you did not of your own knowledge know of any? A. I did not know of any pending strike at all.

Mr. Bensel: He indicated that he learned about the strike on the 7th, and it is apparent he didn't know it then.

Do you want to correct your answer?

The Witness: Yes, I would like to correct the answer as to when I learned that this ship was strike-bound.

I mentioned that the date was September 7th, but that is the date, according to the file, that the traffic department knew about it in Denver, and that is the date I got confused in my mind when you asked the question.

I didn't know about it until after that date, probably the 13th, at the earliest.

* * *

Defendant Colorado's Exhibit A.

FARRELL SHIPPING COMPANY
Established May 15, 1913—
Incorporated April 26, 1919

Export Freight Brokers
Forwarders
Whitney Bldg.

New Orleans 12 U.S.A.

Fernin F. Farrell, President
Richard E. Farrell, Vice-Prest.
Alfred M. Farrell, Manager

Telephones
Raymond 8424-25-26

July 29, 1948

AIRMAIL
The Colorado Fuel & Iron Corp.,
P.O. Box 1920,
Denver, Colorado

ATT: Mr. Wm. DeBoer, T. M.
FORWARDING: 25—BOMBAY

Gentlemen:

As per our wire today we confirm booking with Hansen-Tidemann, Inc., 1,000 tons caustic soda in drums for export to Bombay, India where delivery at New Orleans is required between August 19th/27th. for the ss JANE G. SWISSHELM or A-1 substitute steamer, which vessel is scheduled to sail from New Orleans August 28th/30th. where the Conference Rate of $21.50 per 224#, freight prepaid will apply.

We note from your letter of the 26th. that this material will originate at Ladora, Colorado at the rate of approximately three cars per day where the first consignment

Defendant Colorado's Exhibit A.

should reach here by August 15th., therefore with the free time allowed after the cars arrive we will experience no difficulties in effecting delivery to steamer's dock, thereby avoiding demurrage.

As a matter of information the Isthmian Line advertised three sailings to Bombay during August, and while their September schedule has not yet been fixed they announce the s/s William H. Allen about the middle of September, however they inform us that due to flour going aboard all of their sailings that they are unable to accept caustic soda.

We can assure you that the Trade welcomes Hansen & Tidemann berthing the above steamer to India and hope that it will be a regular service thereafter as Isthmian is the only one operating at the present time from here to India, however, we do take pleasure in informing you that the Strachan Shipping Co. are Agents for the Java-Pacific Lines and today they have announced that the latter will have the United States and Canadian representative of the Nedlloyd Line operating vessels of Dutch Register that will start a service from the Gulf during October to the Mediterranean and Suez Canal, as well as to the West Coast of India and Karachi, also the Persian Gulf.

We now understand that you will start selling caustic soda that you are producing direct to the European Buyers and needless to say whatever shipments that are entrusted to our care will at all times have our best attention.

We now await shipping instructions covering the above 1,000 tons.

Yours very truly,

FARRELL SHIPPING CO. INC.
A. M. FARRELL

AMF:A

Defendant Colorado's Exhibit B.

THE COLORADO FUEL AND IRON CORPORATION

Denver 1, Colorado

Ward Wire
General Traffic Manager

Wm. De Boer
Traffic Manager

K. B. Griffith
Assistant Traffic Manager

September 10, 1948

Farrell Shipping Company
Whitney Building
New Orleans, Louisiana

Gentlemen:

Referring to your telegram of September 7th concerning SS HAWAIIAN being delay . in New Orleans by strike of the west coast crew who re picketing this vessel.

As a matter of curiosity I am unable to understand why this vessel is being picketed and will appreciate your enlightening me on the subject.

Very truly yours,

KBG

Defendant Colorado's Exhibit C.

(Format omitted)

VZ086 23 DL COLLECT=WH NEW ORLEANS LA SEP 7 218P=

THE COLORADO FUEL AND IRON CORP.
GRIFFITH=

SS HAWAIIAN DELAYED BY STRIKE OF WEST COAST CREW WHO PICKETING THIS VESSEL THEREFORE CANNOT COMPLETE LOADING WILL ADVISE SOON AS RESUME LOADING=

FARRELL SHIPPING CO INC=220P.

Defendant Colorado's Exhibit D.

FARRELL SHIPPING COMPANY

Established May 15, 1913—Incorporated April 26, 1919

FERNIN F. FARRELL, President
RICHARD E. FARRELL, Vice-Prest.
ALFRED M. FARRELL, Manager

TELEPHONES
RAYMOND 8424-25-26

EXPORT FREIGHT BROKERS
FORWARDERS
Whitney Bldg.
New Orleans 12, U.S.A.

September 13, 1948

AIRMAIL.

The Colorado Fuel & Iron Corporation
Denver 1
Colorado.

Attention: Mr. K. B. Griffith

Gentlemen:

Your letter of September 10th. has been duly received regarding the status of the SS. "HAWAIIAN".

Defendant Colorado's Exhibit D.

As you are aware, the Maritime Union, operating from the Pacific Coast is striking against the Steamship Lines.

Isbrandtsen Steamship Company chartered the SS. "HAWAIIAN" from a West Coast Line and the crew belongs to one of the West Coast Unions; therefore, when the strike commenced on the Pacific Coast the West Coast crew struck here and picketed the vessel. By that time, the vessel had been in port several days and your caustic soda was loaded; therefore, we were able to secure the Bs/L to cover.

It subsequently developed that all stores and perishable material had to be removed from the vessel, as the crew refused to allow her to sail; or load remaining cargo.

It now looks like this vessel will stay in port until the strike has ended and there is no chance at present of loading additional cargo on her or of removing cargo already on board.

We shall keep this matter before us and wire you in the event that there is a change in the status of this vessel.

Yours very truly,

FARRELL SHIPPING CO., INC.
FRED BECKER, JR.

FB/jm

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Office - Supreme Court, U.S.
FILED
AUG 20 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT.

(Civil Action No. 62-10.)

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

Plaintiffs-Appellants,

against

THE COLORADO FUEL AND IRON CORPORATION, ISBRANDTSEN COMPANY, INC.,

Defendants-Appellees,

and

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Defendant-Appellee-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX OF DEFENDANT-APPELLEE-APPELLANT AMERICAN-HAWAIIAN STEAMSHIP COMPANY

UNITED STATES COURT OF APPEALS
FEB 27 1957
SECOND CIRCUIT
J. DANIEL FUSARO, CLERK

Pandick Press, Inc., 22 Thomas St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
Relevant Docket Entries	1a
Plaintiffs' Exhibit 4 (In Part)	2a, 19a
Trial Minutes	6a
Plaintiffs' Exhibit 3 (In Part)	30a
Plaintiffs' Exhibit 2 (In Part)	34a
Plaintiffs' Exhibit 3	35a
Masse Exhibit 1 (In Part)	35a
Time Charter	35a
Plaintiffs' Exhibit 1	38a
Schedule AO and AS (In Part)	38a
Plaintiffs' Exhibit 1 (In Part)	40a
Schedule J	40a
Schedule AY	41a
Schedule Z	42a
Schedule AH	43a

WITNESSES FOR PLAINTIFFS.

Frederick Becker, Jr. (Deposition),	
Direct	2a
Cross	3a
Re-cross	5a
Charles J. Conlon,	
Cross	17a
Re-cross	19a

PAGE

John Hansen Dalton (Deposition),
Direct 19a
Cross 20a
Re-cross 21a

Robert T. Smith (Deposition),
Direct 23a
Cross 24a
Re-direct 27a

James Rufus Gormley (Deposition),
Cross 28a
Re-cross 28a

R. S. Dass Badhwar (Deposition),
Direct 34a

WITNESSES FOR DEFENDANTS.

Frederick R. Becker,
Direct 6a
Cross 7a

Ward Wire,
Cross 8a

Matthew S. Crinkley,
Direct 9a
Cross 9a

Siguard E. Simpson, Jr.,
Direct 11a
Cross 12a
Re-cross 13a

Robert L. Gray,
Direct 13a

Frank H. Bain,
Direct 17a

Joseph H. Masse (Deposition),
Direct 30a
Re-direct 33a

United States Court of Appeals

FOR THE SECOND CIRCUIT.

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the copartnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

Plaintiffs-Appellants,

against

THE COLORADO FUEL AND IRON CORPORATION, ISBRANDTSEN COMPANY, INC.,

Defendants-Appellees,

and

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Defendant-Appellee-Appellant.

Civil Action No. 62-10.)

Relevant Docket Entries.

Date	Filing Proceedings
1951	
Feb. 24	Filed Answer of Defendant Isbrandtsen Company, Inc., to Cross-Claim of American-Hawaiian Steamship Company.
1955	
Jan. 12	Filed Notice to Amend Answer upon trial of Defendant, American-Hawaiian Steamship Company.
1955	
Sept. 21	Filed Judgment of Dismissal of Complaint and Cross Complaint.
1955	
Oct. 19	Filed Defendant, American-Hawaiian Steamship Company's Notice of Cross-Appeal.

Plaintiffs' Exhibit 4 (In Part).

(Becker Deposition).*

(174) Frederick Becker, Jr., called by and on behalf of the Plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

Direct examination by Mr. Dunn:

(177) Q. Who is the owner of that vessel? A. I do not know how to answer that question. As far as we were concerned, we were dealing with the Isbrandtsen Steamship Company as operators of the vessel. We did not deal with the owners.

Q. Was Isbrandtsen the firm with which you made your shipping arrangements? A. That is correct.— —I would like to qualify that. Isbrandtsen was represented here by a firm which at that time was operating under the name of Hansen & Tidemann and we made our freight engagement with Hansen & Tidemann as agents for the Isbrandtsen Steamship Company.

Q. Hansen & Tidemann were acting as agents for Isbrandtsen and you were acting as agents for Colorado? A. That is correct.

. . . . . .

(180) Q. I show you the paper marked Defendants' Exhibit B and ask you if that is a typewritten copy of the contract you made at that time? A. That is a true copy of the contract in my possession.

Mr. Tillinghast:

Q. And the contract in your possession is a copy? A. A signed copy; probably the original is in the possession of our shipper.

Mr. Dunn:

Q. By whom was the original actually signed? A. Do you mean that for the agent of the vessel or the shipper?

---

* Page references for all depositions are to the stenographically numbered pages in each particular deposition.

Plaintiffs' Exhibit 4 (In Part).

Frederick Becker, Jr., for Plaintiffs—Cross.

Q. I mean who was the individual person who signed his name (181) to it? A. For whom? For the steamer or the shipper?

Q. For the steamer? A. Mr. S. E. Simpson.

Q. And with what firm was he connected at the time? A. He was an employee of Hansen & Tidemann.

* * * * * *

Q. The contract was made out in the name of Colorado Fuel & Iron Corporation? A. That's correct, in care of Farrell Shipping.

Q. Were you authorized by Colorado Fuel & Iron Corporation to make that contract or agreement? (182) A. I would like to again refer to my file. I am satisfied we were, but I would like to confirm it. (checks file) Colorado Fuel wrote us on July 26th, authorizing us to book 1,000 tons of caustic soda, the first part of which would arrive at New Orleans about August 15 of 1948.

* * * * * *

(203) Q. Well, your duties, I take it, then, continued up to the time that you did transmit bills of lading? A. That is correct.

Q. Did you make any inquiries as to the progress of the loading of the vessel? A. There is nothing in the files to reveal it. Very probably we were in touch with it, like we are with all of our shipments.

* * * * * *

Cross examination by Mr. Bensel:

(211) Q. When did you receive those bills of lading from Hansen & Tidemann? A. On September 3rd, I feel sure.

Q. And when did you send them, with the letter, Exhibit "I"? A. We would have mailed them immediately, the same day.

(212) Q. To-wit, September 3rd? A. That is right.

Plaintiffs' Exhibit 4 (In Part).

Frederick Becker, Jr., for Plaintiffs—Re-cross.

Q. Can you explain why the letter bears the date September 1st? A. Yes. In our office we always try to work ahead, and in doing so we often date our letters the date we anticipate the document will be ready for transmittal. We are very busy and we cannot afford to have too large an organization. Therefore, whenever we have an opportunity we work ahead. We customarily try to change the dates, but apparently in some cases it was overlooked.

* * * * * *

Re-cross examination by Mr. Scott:

(218) Q. Mr. Becker, your company prepared the originals of these bills of lading (indicating Exhibits F and H), signed by Hansen & Tidemann, by Mr. Dalton, which have been marked Exhibits "F" and "H"? A. Yes, sir.

Q. Those were prepared in good faith on the basis of the facts then known to your company and to you? A. Those were prepared on the basis of the information furnished (219) us by our shipper, plus the facts of the car numbers we had ordered to the vessel and the contents based on the figures given us in the rail bills of lading.

Q. They were prepared in the regular course of business? A. That is correct.

Q. In the regular way? A. That is right.

Q. In good faith? A. Definitely.

Q. On the basis of the facts then known to you? A. That is right.

Q. And submitted to Hansen & Tidemann for a signature? A. For signature and dating and completion.

Q. Signed by Mr. Dalton? A. Well, I think it was signed by Mr. Simpson, if I recall correctly.

Q. Well, these show that they were signed by Mr. Dalton, I believe? A. Then, they were. That is correct.

Q. Signed by somebody for Hansen & Tidemann? A. Signed by Hansen & Tidemann's representative; yes.

Plaintiffs' Exhibit 4 (In Part).

Frederick Becker, Jr., for Plaintiffs—Re-direct.

Q. And returned to you? A. Returned to us after they inserted the pertinent information, through rubber stamps and what not that apply.

Q. And by you delivered to Colorado? (220) A. That is correct.

Q. Did the procedure follow the regular and customary procedure in such transactions? A. Yes; nothing out of the ordinary.

* * * * * *

Re-direct examination by Mr. Dunn:

(238) Q. When you inquired you presumably were given an answer, or some information as to the fact, as to the status of the caustic soda at that time? A. Quite possibly we were told it was not yet loaded. It was an "On Board" lading, if you recall, and, therefore, we could not expect to get it until all the cargo was on board the vessel.

Q. Did you have any reason for thinking it might be loaded by September 1st? A. Possibly, because I see in here we had given them a date as late as August 31st for delivery of the cargo. There was always a possibility, while they expected it to take longer, it could be loaded on the first of the month.

Q. And you knew when the loading started, did you not, at that time? A. I am not quite positive I did. I would assume I did.

Q. Well, you knew when you had delivered the merchandise for loading? (239) A. No, Mr. Dunn. I don't know whether you are aware of the operation at Westwego or not, but the railroad delivers directly to the steamship company when the steamship is ready to load it. Therefore, we would not know ahead of time that it is all loaded. We would know that it is, perhaps, placed on the wharf ready for loading.

Trial Minutes.

Frederick R. Becker, Jr., for Defendant—Direct.

Q. Did you expect the caustic soda to be loaded as quickly as possible? A. Yes, because we understood that that was the first cargo to go aboard the ship. It was because the vessel was scheduled— —I believe it loaded very limited other cargo over there and then was coming to this side of the river to top off. Therefore, it was obvious the caustic soda would be some of the first to be loaded.

Q. Did you ascertain whether it would be the first to be loaded? A. No, Mr. Dunn. I don't ask the steamship company how they are going to stow a vessel.

Q. Are you quite sure now that you did not? A. No, I am not. Can your memory recall to you sometimes four years ago?

Q. I am asking you? A. All right. No, my memory is not good enough to recall an instance of that sort. It is routine in our office.

* * * * * *

Trial Minutes.

(Testimony of Frederick R. Becker, Jr.)

(213) Frederick R. Becker, Jr., called as a witness in in behalf of Colorado Fuel and Iron Corporation, having been first duly sworn, testified as follows:

Direct examination by Mr. Bensel:

(217) Q. With whom did you make the arrangements for space for this merchandise? A. Well, we were finally successful in getting space from Isbrandtsen Steamship Company through their agents, Hansen & Tidemann.

Q. In New Orleans? A. Yes.

Q. And did you, on behalf of Colorado, enter into a freight engagement contract? A. We did.

Trial Minutes.

Frederick R. Becker, Jr., for Defendant—Cross.

Mr. Bensel: Your Honor, that has been offered in evidence and I am not going to take any time with that.

Q. That was on July 29th, wasn't it? A. I think that's correct.

* * * * * *

Cross examination by Mr. Scott:

(257) The Court: When you say that it made no difference to you, you mean that when you were booking the cargo space it made no difference to you—

(258) The Witness: It made no difference to us who the owner of the ship was. We were doing business with Isbrandtsen.

* * * * * *

Cross examination by Mr. Tillinghast:

(262) Q. I show you a paper which is marked Dalton's Exhibit B taken at the time we took Mr. Dalton's testimony in New Orleans.

Will you tell me what that is, if you know (handing to witness)? (263) A. That's a photostatic copy of the original freight engagement for the first thousand tonnage.

Q. Between what parties was that agreement made? A. Between what parties?

Q. Yes. A. Between Colorado Fuel and Iron, through us, as their agent, and Hansen, Tidemann & Dalton, steamship agents.

Q. Is it signed? A. It is signed Isbrandtsen Steamship Company, Hansen & Tidemann, Agents.

Q. Is that generally the preliminary to any booking arrangement? A. That's correct.

* * * * * *

Trial Minutes.

Ward Wire, for Defendant—Cross.

(266) Q. Have you testified who prepared the bills of lading? A. We prepared them, presented them to Hansen, Tidemann & Dalton, and they finalize them by putting proper rubber stamps and dates and signatures, etc.

Q. Did you discuss this shipment with the American-Hawaiian Steamship Company at any time? A. No, at any time.

• • • • • •

(TESTIMONY OF WARD WIRE)

(292) WARD WIRE, called as a witness in behalf of the defendant Colorado Fuel and Iron Corporation, having been first duly sworn, testified as follows:

Cross examination by Mr. Dunn:

(310) Q. Is it true that whatever shipping arrangements you had to make in New Orleans for any shipments during that period and for a period of years prior thereto were handled through the Farrell people? A. Yes, all of our shipments that we made where (311) we designate the broker are handled through Farrell. We sell some goods in which they have their own broker that sell F. A. S. Gulf ports, and that is consigned to those brokers in that case, but that is very light.

Q. There is no question that whenever you had to make a shipment of New Orleans you handled the details thereof, the booking of the space and so on, through Mr. Becker and his associates? A. Yes, through his company, Farrell & Company, for many years.

• • • • • •

Trial Minutes.

Matthew S. Crinkley, for Defendant—Direct—Cross.

(TESTIMONY OF MATTHEW S. CRINKLEY)

(317) MATTHEW S. CRINKLEY, called as a witness by defendant Isbrandtsen Company, Inc., being first duly sworn, testified as follows:

Direct examination by Mr. Scott:

Q. Did this matter in suit here, as far as (318) Isbrandtsen was concerned, come under your overall supervision? A. Yes, sir.

Q. You are familiar in general with the booking under which this caustic soda was booked? A. Yes, sir.

Q. And the substitution of the SS. *Hawaiian* for the *Swisshelm*? A. Yes, sir.

Q. Who were your agents at New Orleans? A. At that time it was Hansen & Tidemann, Inc.

* * * * * *

Cross examination by Mr. Tillinghast:

(325) Q. Was this charter for a voyage between any particular ports or was it for a period of time? A. A period of time.

Q. And you understood by the charter that you could order the ship to loading ports that you required and that the ship would carry the cargo to ports which you also designated? A. Yes, sir, that was the understanding and in accordance with the charter party or contract.

Q. The entire cargo space of the *Hawaiian* was chartered to your company; is that true? A. Yes.

Q. Was the ship subsequently delivered to your company under the charter party? A. Yes, sir.

* * * *

Trial Minutes.

Matthew S. Crinkley, for Defendant—Cross.

(327) Q. Whom did Hansen & Tidemann act for in New Orleans, if you know? A. They acted for Isbrandtsen Company, Inc. They were our agents. Is that what you mean?

Q. Yes. What services did they render to your company as agents? A. Several services. They were supposed to give the necessary attention to the vessel, the obtaining of a pier, the employment of stevedores, the booking and delivery of cargo to piers, instructions to stevedores as to loading, the solicitation and obtaining of cargo, also, the issuance of the necessary documents, the collection of freights and accounting to us.

Q. And did they perform all those services on this occasion? A. Yes, sir, they did.

* * * * * *

(328) Q. Do you recall the name of the stevedoring company who acted? A. I believe it was the New Orleans Stevedoring Company— —I am not sure if that is the correct title— —under the management of Mr. R. T. Smith.

Q. And the expenses of obtaining berth space and stevedoring and other functions performed were paid by the Isbrandtsen; is that true? A. That is true.

* * * * * *

(329) Q. Was there any other practical reason why you couldn't discharge the cargo? A. You couldn't work the ship. If you couldn't load, you couldn't discharge. You couldn't have gotten it out of the ship regardless of whether we wanted to or didn't want to or whether the shipper wanted to or didn't want to. You couldn't handle cargo in or out of the ship.

The Court: Couldn't handle cargo in or out?

The Witness: In other words, the ship was inactive. The winches were not working and wouldn't be permitted to work.

Trial Minutes.

Siguard E. Simpson, Jr., for Defendant—Direct.

By Mr. Tillinghast:

Q. By whom? A. By the crew of the ship. They have to furnish electricity or steam for the winches.

Q. If the crew were off the ship, then there wouldn't be anybody to furnish that; isn't that true? A. Yes, sir.

Q. Could you have hired people to work the ship from outside the union to which this crew belonged? (330) A. No, sir.

Q. Why? A. The unions have that whole situation too much controlled to permit any such.

* * * * * *

(Testimony of Siguard E. Simpson, Jr.)

(349) Siguard E. Simpson, Jr., called as a witness by defendant Isbrandtsen Company, Inc., being first duly sworn, testified as follows:

Direct examination by Mr. Scott:

Q. What was the relationship between Hansen & Tidemann and Isbrandtsen at that time with respect to this vessel, the SS. *Hawaiian*? A. Hansen & Tidemann, Inc. in New Orleans were agents for Isbrandtsen Company, Inc.

* * * * * *

(351) Q. Had any request been made by Farrell Shipping Company for those bills of lading before that time? A. Yes. It is a normal procedure to be called and asked when they could possibly—when they may expect to be able to receive their ladings. They called the day prior, the 2nd.

Q. Who, for Farrell, made that request? A. Well, it would be any number of persons in their office. I don't think it was Mr. Becker himself. I would say one of the clerks under his jurisdiction in the office would call to find out when his bills of lading would be ready.

* * * * * *

Trial Minutes.

Sigvard E. Simpson, Jr., for Defendant—Cross.

(354) Q. Were Hansen & Tidemann prepared to pay the overtime that is mentioned in that letter? A. Well, for the account of Isbrandtsen Company, (335) of course. Working as agents for Isbrandtsen Company, yes, sir.

* * * * * *

(356) Q. After the strike was over, was this vessel (357) loaded and dispatched from New Orleans as fast as possible? A. Yes, sir, she was. She worked completely around the clock from the commencement of loading until she sailed.

Q. Who paid the stevedores? A. Isbrandtsen Company, Inc. of New York.

Q. And you made the payment at New Orleans as their agents? A. That's right, submitted payments to them.

* * * * * *

Cross examination by Mr. Tillinghast:

(358) Q. You have testified that bills of lading were issued for the two shipments of caustic soda which are the subject of this action and that they were signed by your company on behalf of the Isbrandtsen Company; is that true? A. That's correct.

Q. And the bills were delivered to the Farrell Shipping Company? A. Yes.

* * * * * *

(366) Q. Did you order stevedores to work overtime on September 2d? A. Yes, sir, they were ordered to work around the clock. We had decided because of the overtime, to get the ship out, to sail the ship before the weekend would cost a lot less than what the ship was actually costing us.

* * * * * *

Trial Minutes.

Siguard E. Simpson, Jr., for Defendant—Re-cross.

Robert L. Gray, for Defendant—Direct.

Re-cross examination by Mr. Dunn:

(395) Q. This overtime loading, by the way, the round-the-clock loading, of course normally enables you to get done three days' work in one of normal loading? A. Almost. We have to—we still have to consider your meal hours in there, of course.

* * * * * *

Re-cross examination continued by Mr. Tillinghast:

Q. After the labor dispute was settled and the labor impediments were removed in December, 1948, were operations resumed on the ship? A. Yes, sir.

Q. Was there any delay in resuming operations? A. Not any abnormal delay, if any.

Q. What do you mean by that? A. Well, I mean anything that would hold the ship up outside of her normal operations.

Q. It took a considerable time to get a crew, didn't it? A. I think two or three days.

* * * * * *

(Testimony of Robert L. Gray)

(398) Robert L. Gray, called as a witness on behalf of American-Hawaiian Steamship Company, being first duly sworn, testified as follows:

Direct examination by Mr. Tillinghast:

(405) Q. Who furnished the berth of the ship when she did arrive at New Orleans? A. Isbrandtsen made all arrangements for cargo, berths, etc.

* * * * * *

Trial Minutes.

Robert L. Gray, for Defendant—Direct.

Q. Do you know what cargo was loaded at New Orleans, Mr. Gray, at this time? A. No, I don't.

Q. By whom was the cargo loaded? A. Isbrandtsen made the arrangements for loading the cargo.

Q. They arranged for the stevedores also, did they? (406) A. Yes.

Q. What function had the captain, if any, with regard to the loading and stowage of the cargo? A. The cargo was to be loaded to his satisfaction as far as stability and trim of the ship was concerned.

The Court: Isn't that a matter of common knowledge?

Mr. Tillinghast: Yes, Judge Ryan, it is.

The Court: He doesn't want it in a hold if it doesn't go there. That is his job.

By Mr. Tillinghast:

Q. Did the American-Hawaiian have any knowledge of the cargo which was to be loaded at that time? Did you know of the shipments which Isbrandtsen was going to load on your ship? A. I did not, no.

Q. Did your company, except possibly for the master? A. I can't answer that.

Q. Did the American-Hawaiian or anyone on behalf of the ship have anything to do with two shipments of about 1,500 tons of caustic soda which were loaded at that time? (407) A. No.

Q. Was your company a party to the negotiations for the booking of that cargo? A. No.

Q. Did you issue any bills of lading for that cargo? A. No.

Q. Did you receive any freights in connection therewith? A. No.

Trial Minutes.

Robert L. Gray, for Defendant—Direct.

Q. Under the charter you were required to receive any lawful cargo which the charterer desired to load; is that true? A. Aboard the vessel, yes.

Q. At any safe berth where the vessel was ordered by the charterer? A. Provided that the terms of the charter party were met, yes.

. . . . . .

(410) Q. Were there any negotiations between the time the contract expired by its terms and possibly prior thereto up to the time the vessel went on strike? A. Yes.

(411) Q. Were those negotiations continuous? A. Yes, they were.

Q. Were all disputes unresolved during this period by negotiation? Did all the disputes remain unresolved? Were you in agreement with the unions on anything? A. Oh, yes, on some things we were in agreement and other things not.

Q. What would you say with respect to the prospects of a strike, say, in the middle of August, 1948? Did you know the strike was going to occur? A. No, I did not.

Q. Were you optimistic that the disputes would be resolved by negotiation? A. I thought we would get together, yes.

Q. Right up to the last minute? A. Yes.

. . . . . .

(412) Q. Do you know if they were negotiating on the 2nd of September, Mr. Gray? A. Yes, I believe they had a meeting the morning of the 2nd of September.

Q. And at that time they were in agreement on a great many things, weren't they? A. On some things they were in agreement, yes.

Q. When the strike was finally declared, how long was it going to last? A. At that time I did not know.

Q. Did anybody know? A. I don't believe so.

Trial Minutes.

Robert L. Gray, for Defendant—Direct.

Q. Did the negotiations continue after the strike was declared? A. Yes, they did.

Q. The disputes might have been settled at any time, isn't that true? A. Oh, yes.

* * * * * *

(419) The Court: Did you order or did your home office order any of the ships in any port to be tied up in port and not sent out on a voyage at any time during this period that the injunction order was operating?

The Witness: No, sir, we operated on the theory that there would not be a strike and we operated as normal.

The Court: And you continued to accept cargo on all ships?

The Witness: Yes, sir.

The Court: And you did not instruct the masters of any of your ships to the contrary?

The Witness: No, sir, we did not.

* * * * * *

By Mr. Tillinghast:

(420) Q. When the strike was finally called, Mr. Gray, was there any delay or any unusual delay in obtaining a crew? Did you get a crew as quickly as you could? A. Yes, we got a crew as soon as possible.

Q. And did it take some time for the crew to get (421) up steam and otherwise prepare this ship for the service in view of the length of time that she had been laid up? A. Yes, it would require quite a few days.

Q. And you used all reasonable dispatch in getting the ship into condition again, is that right? A. Oh, we did; we wanted to get back on charter, of course.

* * * * * *

Trial Minutes.

Frank H. Bain, for Defendant—Direct.

Charles J. Conlon, for Plaintiffs—Cross.

(Testimony of Frank H. Bain)

(422) Frank H. Bain, called as a witness by defendant American-Hawaiian Steamship Company, being first duly sworn, testified as follows:

Direct examination by Mr. Tillinghast:

(427) Q. Were you familiar with the negotiation of labor disputes during the year 1948 between your company and the maritime unions? A. In general, yes.

Q. Were those negotiations fairly continuous? A. Yes, they were.

(428) Q. Up to the time the strike was declared? A. That's correct.

Q. Did you consider that there would be a strike? A. No, we were all quite optimistic that there would not be a strike, that negotiations would continue.

Q. Did you carry on your business on a day-to-day basis with that in mind? A. That's right. We continued on in a normal way.

Q. When the strike was finally declared, was there any way of knowing what its duration would be? A. No.

Q. Did your company continue to negotiate with the unions toward a settlement? A. I understand that they did, yes.

* * * * * *

(Testimony of Charles J. Conlon)

(121) Charles J. Conlon, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

Cross examination by Mr. Bensel:

(149) Q. Did you know or learn at that time that negotiations were under way for settlement? A. Yes.

Trial Minutes.

Charles J. Conlon, for Plaintiffs—Cross.

Q. And if you can project yourself back to that period, is it your recollection that you and the ones you spoke to were hopeful that a settlement would be effected? A. We were optimistic.

Q. You were optimistic all through that period right down to the date when the Pacific Coast strike actually commenced, isn't that so? A. That's right.

Q. Did there come a time in August of 1948 when negotiations in respect of the East Coast resulted in a settlement? (150) A. Yes. We had even during that period, we had a continual flow of shipments——

Q. Even during what period? A. June, July, August and September of 1948, there were vessels that sailed.

Q. My question was this: Did there come a time in August 1948 when you ascertained that the differences between the employees and employers in the Maritime industry in respect of the East Coast had been settled? A. To my knowledge there was, yes.

Q. What? A. To my knowledge there was.

* * * * * * *

Cross examination by Mr. Scott:

(156) Q. You said something about information you had about an injunction under the Taft-Hartley Act in 1948. A. The information we had was generally known that there was going to be an injunction served to prevent the strike.

Q. That was general knowledge among the shipping agents and forwarders, wasn't it? A. That's right.

Q. And you went on with business as usual? A. That's right.

Q. You didn't make any changes in your business? A. No, we continued right along.

Q. And you didn't make any prophecies as to what would happen? A. We couldn't.

Q. You didn't know, did you? A. That's right.

Plaintiffs' Exhibit 4 (In Part).

Charles J. Conlon, for Plaintiffs—Re-cross.

John H. Dalton, for Plaintiffs—Direct.

Q. You didn't know whether it would be settled (157) or whether there would later be another strike? A. That's right.

Q. Did you know of anybody that did know? A. No, sir.

Q. In August of 1948? A. No, sir.

Q. You went on with business as usual? A. Yes, sir.

Q. And so did the other shipping people you knew? A. That's right.

• • • • • • •

Re-cross examination by Mr. Bensel:

(160) Q. But as you said to Mr. Scott a minute ago, in July and August business went on as usual? A. That's right.

Q. You didn't hold back any shipments because of any concern of a possible strike? A. No, sir.

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Plaintiffs' Exhibit 4 (In Part)

(Dalton Deposition)

(3) John Hansen Dalton called by and on behalf of the Plaintiffs, being first sworn by a Notray Public was examined and testified as follows:

Direct examination by Mr. Dunn:

(20) Q. Was your firm the agents, acting in connection with the steamship Hawaiian in New Orleans on or about August 31, 1948? A. If my memory serves me correctly, I believe that we were acting in the capacity of agents for a New York ship operator, not for the owners of the vessel.

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Plaintiffs' Exhibit 4 (In Part),

John H. Dalton, for Plaintiffs—Cross.

(28) Q. Then when it reached Westwego, who prepared the stowage plan?' A. That— —your mean who would tell the stevedore how to load the cargo?

Q. Yes. A. In this case— —and my records would never reflect who would actually tell him— —customarily, the agent would tell the stevedore, after receiving those advices from the ship operator. In this case, the operator could (29) have possibly told the stevedore direct or we, as the agent, could have told the stevedore, but this particular stevedore was dealing directly with this operator at the time, not necessarily in every case through our office.

* * * * * *

(54) Do you recall whether some of that cargo loaded in December was booked in the interim between September 3rd and December 9th? A. I could not answer you yes, but I could say I believe so.

* * * * * *

Cross examination by Mr. Bensel:

(68) Q. Now, you testified that Farrell Shipping Company arranged for the shipping space for this caustic soda, did you not? A. No, I did not testify that way. I think I was asked if I knew who was representing the Colorado Fuel & Iron Company. I said, to the best of my knowledge and belief, Farrell Shipping Company.

Q. In connection with the shipment of caustic soda? (69) A. In connection with the shipment of caustic soda.

Q. And they are known as brokers, in the transaction? A. They are known as brokers in the transaction.

Q. And they received a certain brokerage commission for their services in such a transaction? A. Ordinarily, yes. You are speaking now from the ship?

Q. From somebody? A. I don't know from the shipper. From the ship, ordinarily, they would get a brokerage.

Plaintiffs' Exhibit 4 (In Part).

John H. Dalton, for Plaintiffs—Re-cross.

Q. Did they receive a brokerage fee in connection with this transaction? A. I would have to refer to my records, but I am reasonably sure they did.

Q. There is no doubt about it, is there? A. Not in my mind. No.

Q. And that brokerage was paid by whom? A. Well, it would be paid by Isbrandtsen Company, whether direct or through me I don't know at this particular moment.

(70) Q. Now, you testified that there was a substitution made of the *Hawaiian*— —the SS. *Hawaiian* for the *Swisshelm*, (71) as far as this particular contract, or "Exhibit B" is concerned? A. That is what the record shows.

Q. Who made that substitution? A. Well, it could not be anyone but the ship operator: Isbrandtsen. That is, as far as I am concerned. The booking was made by us apparently for account of Isbrandtsen Company for the *Swisshelm* or substitute. If there was a substitute boat and apparently it was, it must have been substituted by Isbrandtsen.

Q. Who issued the bill of lading in connection with this shipment of caustic soda? A. I would have to check the records, but I believe in this case we did.

Re-cross examination by Mr. Scott:

(97) Q. Mr. Dalton, in 1948, your firm, Hansen & Tidemann, were acting as agents for Isbrantsen Company, Inc., of New York? A. I don't know whether that is true for the whole year of 1948.

Q. In and after August? A. I know that is true in this particular time of which we are speaking.

Q. In connection with this vessel, the SS. *Hawaiian*? A. Definitely.

Plaintiffs' Exhibit 4 (In Part).

John H. Dalton, for Plaintiffs—Re-cross.

Q. Through from August until December of that year? A. I would say yes.

* * * * * *

(99) Q. With respect to bills of lading No. 144 and 145, which have been marked Exhibits "Defendants'-F and H", in this case, which appear to be signed by Hansen & Tidemannn, "Per Pro: J. H. Dalton." That refers to you? A. That is correct.

Q. J. H. Dalton? A. That is correct.

Q. You signed those bills of lading? A. I signed the original; yes.

Q. You signed the original bills of lading on the dates specified in the bills? A. Definitely.

Q. At that time were the goods referred to in those bills of lading on board the SS. *Hawaiian?* A. Definitely.

Q. They were on board when the bills of lading were issued and signed? A. Definitely.

Q. Were those bills of lading prepared by Farrell Shipping Company which represented Colorado Fuel & Iron Corporation? A. I can only assume so, as that is customary.

Q. Were they issued and signed by you in the regular course of business? (100) A. Right; that is correct.

Q. And in the regular way? A. That is correct.

* * * * * *

(105) Q. Mr. Dalton, there is nothing unusual about overtime in connection with the loading of ocean going vessels, is there? A. I would say in these days of high expenses it is more usual than unusual; high expenses of ship operating, that is.

Q. And to the extent that it saves time of the ship, it is not a net loss; the extra expenses? A. Sometimes it is a net gain. It is a gain occasionally for the operator, depending on how much money he spends for overtime as

Plaintiffs' Exhibit 4 (In Part).

Robert T. Smith, for Plaintiffs—Direct.

against what the ship is costing him for what he is paying for the ship.

Q. Mr. Dalton, you are satisfied that your firm, Hansen & Tidemann, did everything possible within its power to load and despatch this ship at the earliest possible time?

Mr. Dunn: Objected to as to form.

A. Definitely.

* * * * * *

(107) A. I would say at the particular time the vessel was on strike it was my opinion if we wanted to discharge the cargo that would not have been possible.

Mr. Bensel:

Q. Why would it not be possible? A. The vessel on strike— —her gear would not work, naturally; she had no steam. If we attempted to employ cranes to discharge that ship I assume, as customary, the seamen would put up a picket line and the longshoremen would not cross it.

(Smith Deposition.)

(111) Robert T. Smith called by and on behalf of the Plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

Direct examination by Mr. Dunn:

(122) Q. Referring again to the loading of the vessel *Hawaiian* at New Orleans, did the New Orleans Stevedoring Company, Inc. supply the stevedores on that job? A. Yes, sir, they were the contractors designated by Isbrandtsen to load the vessel.

Plaintiffs' Exhibit 4 (In Part).

Robert T. Smith, for Plaintiffs—Cross.

Q. What was Isbrandtsen's connection with the vessel? A. Isbrandtsen were the chartering owners of the vessel.

Q. You mean by that charterers or owners? A. Charterers.

• • • • • •

(123) Q. You stated, I believe, that you were engaged by the Isbrandtsen Company? A. That's correct.

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(126) Q. Was any overtime work in the loading of the SS. *Hawaiian* on that occasion? A. To the best of my knowledge, yes.

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(127) Q. On the overtime, what you recall working, was that on request or instructions of others? A. Well, ordinarily, in my dealings with Isbrandtsen, I had certain amount of authority to guide the working of the vessel in so far as overtime is concerned to conform with the scheduled advertised sailing date. If we encountered delays that would make us miss our sailing date, or if the vessel was late in arrival, we worked the necessary overtime consistent with the availability of the cargo so that the vessel would be able to sail on that scheduled advertised date.

• • • • • •

Cross examination by Mr. Tillinghast:

(146) Q. Yes. A. I don't recall any suggestion of that kind, but I would say this: That had it been made, I would have said that wouldn't be possible because the ship's crew would have thrown a picket line around the vessel and (147) the labor would not have gone aboard.

Q. On this point, please excuse my ignorance. How could they extend a picket line beyond the vessel in an open

Plaintiffs' Exhibit 4 (In Part).

Robert T. Smith, for Plaintiffs—Cross.

ship if you were to use a crane on a barge? A. If the ship, you mean, was at anchor?

Q. Yes. A. Well, sir, you have a boat landing by which the labor would be taken aboard the ship and they would picket that boat landing.

Q. Do you know, of your own knowledge, of course, whether there was a request made by anyone to remove this cargo in order that it might be carried on another ship? A. I can't positively state that.

Q. Would you say that the cargo could not have been removed from the holds of the *Hawaiian* once the strike started? A. Under the circumstances, it would have been impossible.

Q. Physically impossible to remove it? A. Impossible.

* * * * * *

(155) Q. Strikes or work stoppages are usually temporary in nature? A. Temporary, yes, sir.

Q. From your experience, would you say that a layup of three months was an extraordinary thing? A. Yes, sir.

* * * * * *

Cross examination by Mr. Scott:

(157) Q. When you wrote this Exhibit 3 on September 2, 1948 (Hands document to witness), you didn't know whether there would be a strike or not, did you? A. That's very difficult to answer except in this way: that, had I known on September 2, that on September 3, the vessel would be shut down account of strike, that it would have been impossible to get all of our cargo on board that night, or by daylight the next morning——

Q. Go ahead? A. That's all.

Q. Don't think you completed your sentence. (Answer read by the reporter). A. Well, to be more specific, I don't recall at that time the letter was written of having any knowledge that the vessel would go on strike the following day. Does that answer?

Plaintiffs' Exhibit 4 (In Part).

Robert T. Smith, for Plaintiffs—Cross.

Q. And that letter was written on Thursday, September 2, wasn't it? A: I believe Thursday was September 2, according to the records here.

Q. Friday was September 3, Saturday was September 4. A. (Examines documents.) September 2 was a Thursday.

Q. September 3 was a Friday and September 4 was Saturday? (158) A. That's correct.

Q. And then, in your letter, you refer to Saturday? A. That's right.

Q. You refer to the possibility of the vessel sailing on Saturday? A. That's correct.

Q. So that letter is written, is it not, on the supposition that the then existing situation would continue and there would be no strike? A. That's correct.

Q. You wrote that letter in good faith, didn't you? A. Certainly.

Q. And the matters and views you expressed in that letter were honestly expressed by you at the time you wrote it? A. Yes, sir.

* * * * * *

(166) Q. It would not have been possible to have put cargo aboard that vessel while the strike was in effect? A. No.

Q. You mean by your answer that it would have been impossible; is that right? A. Correct; it would have been impossible from a stevedoring standpoint.

Q. You know of nothing that the owners, operators or agents could have done to have completed the loading and despatch of that vessel until the strike was over? A. To the best of my knowledge and the conditions that existed at that time, there was nothing they could do about it.

(167) Q. The only thing you can do in a strike like that is to wait out the strike? A. That seems to be all we can do; it's all we have ever been able to do.

Plaintiffs' Exhibit 4 (In Part).

Robert T. Smith, for Plaintiffs—Re-direct.

Q. And that answer is given on the basis of your long experience in the stevedoring business and at the Port of New Orleans? A. That is correct.

* * * * * *

Re-direct examination by Mr. Dunn:

(168) Q. Would you say that the operators did all they could to load the vessel while they had the opportunity to do so? A. Yes, I would say so, Mr. Dunn. Every good operator strives very hard to get his ship at sea if there is a pending work stoppage. I might facetiously say that that applies to Christmas too and in all my experience, which has been many years, I have naturally come upon many work stoppages, contemplated work stoppages. For instance——

Mr. Tillinghast: Don't stop.

Mr. Bensel: Let him finish his answer.

A. For instance, if we anticipate trouble through the expiration of our contract, we have often been called (169) upon to try to complete the loading before that trouble happens, if we are sure that it's going to happen.

Mr. Dunn:

Q. And in this particular case you did all that you could to get the ship loaded at that time, is that so? A. I would say that from the record, that's apparently so by reason of working all that night prior to the work stoppage.

* * * * * *

Re-direct examination by Mr. Tillinghast:

(169) Q. In the same way, is it customary to suspend ship operations when you consider that a strike might be about to occur? A. No, sir, we keep——

Mr. Dunn: Object to that question.

Plaintiffs' Exhibit 4 (In Part).

James R. Gormley, for Plaintiffs—Cross—Re-cross.

(170) A. We keep working up till the time we are actually stopped.

Mr. Tillinghast:

Q. Why do you continue to work? A. We continue to work because there is often disturbances of various kinds that are in the offing, but never materialize. We just couldn't stop industry because of a threatened or a rumored strike.

Mr. Tillinghast:

Q. And by the same token, if it does occur, it's usually temporary; isn't that true? A. In most instances it has been.

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(GORMLEY DEPOSITION)

(242) JAMES RUFUS GORMLEY called by and on behalf of the Plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

Cross examination by Mr. Tillinghast:

(247) Q. Is it a correct statement to say that negotiations had continued up to the time this telegram was dispatched? A. Oh, certainly.

• • • • • • •

Re-cross examination by Mr. Scott:

(255) Q. At the time that telegram was sent, the shipowner's proposals had not been rejected? A. The proposals, a number of the proposals that they had made, had been rejected.

Plaintiffs' Exhibit 4 (In Part).

James R. Gormley, for Plaintiffs—Re-cross.

Q. I am referring to the part of the telegram that says, "UNDER THESE CIRCUMSTANCES WE HAVE NO OTHER RECOURSE THAN TO RECOMMEND THAT THE SHIPOWNER'S PROPOSALS BE REJECTED." A. That is a recommendation that it be rejected, to go on strike. But there are a number of proposals that they had that already had been rejected and they were meeting from time to time to try to straighten them out, and change their viewpoint to keep from going on strike.

Q. And those meetings had continued up to that time? A. Off and on.

Q. That telegram is dated the 2nd of September, 1948, is it? A. That is right.

(256) Q. Can you tell us from it when, or approximately when, it was received at New Orleans? A. The next morning.

Q. That would be on the morning of September 3rd? A. Roughly then, because Labor Day came in there.

. . . . . .

(258) Q. Now, on the second page of that telegram it refers to some period of duration anticipated for the strike. Was it anticipated that the strike might be settled or could be settled, possibly, over the Labor Day Week End? A. There is always a possibility it could.

Q. Well, is that what that word "anticipated" refers to? A. If it was anticipated to be a long one, then we were to fly the strike committee members from each port to San Francisco to be on the National Strike Committee.

(259) Q. This says that that would occur if it appears that strike will be of much longer duration than anticipated. A. That is right; so that the operators might change their viewpoint and get down to business, when all the ships were tied up and the picket lines were set up.

Q. Over the week end Labor Day? A. That is right. It gives them time to think it over.

. . . . . .

Plaintiffs' Exhibit 3 (In Part)

(MASSE DEPOSITION)

(2) JOSEPH H. MASSE, being duly sworn by Harriet C. Thirkield, Notary Public, as a witness on behalf of the American-Hawaiian Steamship Company, testified as follows:

Direct examination by Mr. Tillinghast:

(3) Q. This is a photostatic copy of a time charter between American-Hawaiian Steamship Company and Isbrandtsen Company, [4] Inc., dated August 17, 1948, is that correct? A. Yes.

* * * * * *

Q. Was a copy of the charter delivered to you in August 1948? A. Yes.

Q. Was delivery of the vessel ever made under the charter party which we have been discussing? A. Yes, the vessel was delivered as the vessel passed Quarantine on the voyage to Houston.

Q. Was that the voyage out from New York? A. Out from New York, yes.

* * * * * *

(6) Q. On what date did you arrive at New Orleans? A. Arrived at New Orleans on the 30th of August 1948.

Q. Did you report to anyone at New Orleans when you arrived there? A. I reported to Isbrandtsen's agents again—Hansen & Tidemann.

(7) Q. Did you receive orders from them? A. Yes, received orders to put the ship in to the Standard Oil pier for bunkering, which was done in the morning, and then we went to the loading berth that afternoon.

Q. To what loading berth were you directed? A. I was directed—I can't think of the name of that place—above New Orleans on the other side of the river—Westwego.

* * * * * *

Plaintiffs' Exhibit 3 (In Part).

Joseph H. Masse, for Defendant—Direct.

(8) Q. Who hired the gang—by gang, you mean stevedores? A. Stevedore gangs, yes.

Q. Do you know who hired those stevedores? A. Hansen & Tidemann, Isbrandtsen's agents.

Q. Do you know who paid the stevedores? A. Isbrandtsen.

Q. Was the vessel's gear used to load the cargo? A. Oh, yes.

Q. Who operated the winches? A. The stevedores operated the winches.

Q. Who prepared the vessel's holds for the receipt of cargo, by laying dunnage and so on, if that was done? A. The stevedores.

Q. Do you know who furnished the dunnage? A. I don't know, that would be for Isbrandtsen's account.

Q. With respect to the loading, what did you personally do, if anything? A. I didn't do much, just watched the cargo that went into the ship so I would be familiar with it, that is about all, just to see what the ship was stable.

Q. Did any other officers or crew of the vessel have any functions to perform with respect to the loading, either at Houston or at New Orleans? A. No, just the usual duties.

Q. Which are— A. Duties—well, the usual duties looking for damages—damaged cargo—and make sure, for (9) instance, if we were carrying like wet burlap which would be apt to cause spontaneous combustion, make sure that type of cargo was loaded wet.

Q. Did the engineroom crew have any function to perform? A. Just to keep steam up for the winches to run.

Q. And you said the stevedores ran the winches? A. Yes.

Q. Isn't it a fact that Isbrandtsen's house marks were painted on the stack? A. Yes.

* * * * * *

Plaintiffs' Exhibit 3 (In Part).

Joseph H. Masse, for Defendant—Direct.

(40) Q. On Wednesday, September 1st, loading was continued until 6 P.M., was it not? A. Yes.

Q. What was the reason for working an hour overtime on the loading on that date? A. I don't know that. That would be the stevedore's orders or responsibility, that wouldn't have anything to do with the ship.

Q. Didn't you have general command of the ship and were expected to have it in readiness for loading at the usual hours? A. The ship was ready for loading when she got in to New Orleans, and she was ready for loading at all times while she was in New Orleans.

Q. Did you have anything whatever to do with issuing orders to any of the people on that ship with respect to the loading operations or co-operation therein by the (41) ship's company? A. No, I wouldn't have any responsibility in ordering the stevedores to work or not to work, that is the stevedoring company's responsibility.

Q. How about the engineroom gang and firemen? A. The engineroom gang and firemen, that is true.

Q. Did the stevedore give you notice that he proposed to continue loading for an additional hour? A. No. That may be the custom of the port, at New Orleans, that they work until 6 o'clock, because New York, after 5 o'clock, it is overtime—I don't know what the custom of the port is at New Orleans.

Q. On August 31st you had stopped loading cargo at 5 P.M., is that right? A. Yes, according to the logbook here.

Q. Was there any reason you know of to cease loading prior to the normal hour for quitting at New Orleans? A. No, I had nothing to do with the stevedore's time of starting or quitting, other than to keep a log of it.

* * * * * *

(45) Q. Who did speak to you about the proposed loading of the ship around the clock? A. No one that I can remember.

Plaintiffs' Exhibit 3 (In Part).

Joseph H. Masse, for Defendant—Re-direct.

Q. Was that a complete surprise to you that they continued working around the clock on that date? A. No, it wasn't a complete surprise to me.

Q. Did you have any reason to expect that they would continue loading around the clock? A. No.

Q. Did you have any explanation of why loading continued around the clock? A. That is entirely up to Isbrandtsen, if Isbrandtsen wants to pay the overtime rate to the stevedores to put the cargo in the ship, that is entirely up to Isbrandtsen.

* * * * * *

(57) Q. Who was the agent of the American-Hawaiian Steamship Company at New Orleans? A. Strachan Shipping Company is our usual agent at the port of New Orleans.

Q. Did any representative of Strachan Shipping Company speak to you at any time during your stay at New Orleans, from arrival until September 3rd when the strike was on? A. No, not prior to September 3rd.

* * * * * *

Q. When you arrived at New Orleans originally then, did or did you not report to Strachan Shipping Company your arrival? A. No, we didn't.

* * * * * *

Re-direct examination by Mr. Tillinghast:

(59) Q. Was due despatch, in your opinion, used in loading cargo in New Orleans during the times it was possible to load? A. Yes.

Q. Was the vessel in all respects tight, staunch, strong and seaworthy when she sailed from New York? A. She was.

Q. And at all times during this voyage? A. She was.

Q. And did she prosecute her voyage to India with all despatch? A. She did.

Plaintiffs' Exhibit 2 (In Part).

R. S. Dass Badhwar, for Plaintiffs—Cross.

(60) Q. And without delay? A. That is right.

Q. This vessel was on time charter, is that a fact? A. Yes.

Q. And the owner received payment for all the time that she was on hire, isn't that a fact? A. Yes.

Q. Who determined the hours worked under the time charter, in loading and discharging? A. The charterer.

Q. Was it your responsibility to keep the vessel at all times in readiness? A. That is right.

Q. Was the vessel at all times kept in readiness to load? A. Yes.

Q. Around the clock if necessary? A. Yes.

Q. You loaded cargo as it was tendered? A. Yes.

• • • • • •

Plaintiffs' Exhibit 2 (In Part)

(Badhwar Deposition)

(3) R. S. Dass Badhwar, called and sworn as a witness on behalf of plaintiffs, testified as follows:

Cross examination by Mr. Tillinghast:

(40) Q. It is a fact, also, that steamship companies have to deliver directly into the Port Trust, they can't deliver direct to you? A. No.

Q. You mean yes? A. That is right, they can't deliver directly to me.

Q. When were the goods delivered to your go-down? A. When was it delivered to our go-down? I can't give you exact dates. I could tell you that by March, about the middle of March, we had completed all the removal.

Q. You had received delivery? A. Yes, we had completed the removal, you see.

Q. Into your possession? A. Yes.

• • • • • •

Plaintiffs' Exhibit 3

Masse Exhibit 1 (In Part).

Time Charter.

* * * * * *

This Charter Party made and concluded in the City of New York the 17th day of August 1948 between American Hawaiian Steamship Company * * * and Isbrandtsen Company, Inc.

"Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for about five (5) months to about eight (8) months at Charterers option within below mentioned trading limits. Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfillment of this Charter Party. Vessel to be placed at the disposal of the Charterers, twenty four hours after passing Quarantine, New York Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, winches and donkey boiler with sufficient steam power, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed, in carrying lawful merchandise, including petroleum or its products, in proper containers, excluding explosives, mahogany logs, pitch in bulk, sulphur in bulk and asphalt in bulk (vessel is not to be employed in the carriage of Live Stock, but Charterers are to have the privilege of shipping a small number on deck at their risk, all necessary fittings and other requirements to be for account of Charterers), in such lawful trades, between safe port and/or ports always within American Institute Warranties Limits, as the Charterers or their Agents shall direct, on the following conditions:"

Plaintiffs' Exhibit 3.

"2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is employed under this charter to be for Charterers account. All other fumigations to be for Charterers account after vessel has been on charter for a continuous period of six months or more."

. . . . . .

"6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agents may direct, provided the vessel can safely lie always afloat at any time of tide, except at such places where it is customary for similar size vessels to safely lie aground."

"7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel. Charterers have the privilege of passengers as far as accommodations allow, Charterers paying Owners $3.00 per day per passenger for accommodations and meals. However, it is agreed that in case any fines or extra expenses are incurred in the consequence of the carriage of passengers, Charterers are to bear such risk and expense."

Plaintiffs' Exhibit 3.

"8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

* * * * * *

"11. That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing, and the Captain shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents, and furnish the Charters, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel."

* * * * * *

"23. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging; steamer to provide one winchman per hatch to work winches day and night, as required, Charterers agreeing to pay officers, engineers, winchmen, deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles. See Clause 30. If the rules of the port, or labor unions, prevent crew from driving winches, shore Winchmen to be paid by Charterers. In the event of a disabled winch or winches, or insufficient power to operate winches, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned thereby."

* * * * * *

Plaintiffs' Exhibit 1.

"30. Charterers to pay overtime to officers, engineers, winchmen, deckhands and donkeymen for all overtime done for Charterer's account. The amount of overtime for which Charterers shall be liable will be that which is in excess of overtime Owners would have paid in accordance with union agreements had vessel not been working cargo or otherwise under Charterers instructions."

• • • • • •

"35. Charterers agree to indemnify all consequences or liabilities that may arise from bills of lading inconsistent with this charter being signed by the Captain or for him or from his otherwise complying with same."

• • • • • •

Plaintiffs' Exhibit 1.

Schedule AO and AS (In Part).

Bills of Lading (Terms Identical in both)

ISBRANDTSEN LINES

• • • • • •

Shipper: The Colorado Fuel & Iron Corporation
Consignee: Order of The National City Bank of New York, New York City N. Y.

• • • • • •

"IN ACCEPTING THIS BILL OF LADING the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed, or stamped on the front or back hereof, any local customs or privileges to the contrary notwithstanding.

IN WITNESS WHEREOF, the Master of the said ship has affirmed to THREE bills of lading, all of this tenor

Plaintiffs' Exhibit 1.

and date, one of which being accomplished, others to stand void.

Dated at New Orleans, La. Sep.—3 1948.

For The Master

ISBRANDTSEN COMPANY, INC.
as Agents for the Master

HANSEN & TIDEMANN, INC
By J. H. Dalton /s/

"1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or misdelivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier. If this bill of lading is issued in a locality where there is in force a Carriage of Goods by Sea Act or Ordinance or Statute of a similar nature to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels of August 25, 1924, it is subject to the provisions stated in such Act, Ordinance and rules thereto annexed which may be in effect where this bill of lading is issued."

• • • • • •

Plaintiffs' Exhibit 1 (In Part).

"18. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the Carrier, of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery. The Carrier shall not be liable upon any claim for loss or damage unless written particulars of such claim shall be received by the Carrier within thirty days after receipt of the notice herein provided for."

"19. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

* * * * * *

Plaintiffs' Exhibit 1 (In Part)

Schedule J.

* * *

L C W. A. BARTLETT
CARE COLORADO FUEL AND IRON CORP
1616 EYE ST WASHINGTON D C
REFERENCE OUR NEGOTIATIONS 2000 TONS CAUSTIC SODA SOLID THROUGH NATIONAL CITY BANK NEW YORK BOMBAY AND YOUR ACCEPTANCE OUR OFFER AT 9.5 CENTS PER LB. C I F INDIAN PORT OUR IMPORT LICENSE NUMBER 000417/48 VALID UP TO SEPTEMBER 22 STOP.

* * * * * *

Plaintiffs' Exhibit 1 (In Part)

Schedule AY.

September 13, 1948

The National City Bank of New York
New York 15, New York

Ref: CCF: 87723:JJR

Gentlemen:

This will acknowledge receipt of your checks for $104,631.86 and $212,743.67 in payment of our drafts No. 1838 and 1839 drawn over your credits 86897 and 87723.

We hereby certify that the shipments of caustic soda covered by the above draft were made in new steel drums.

Our New York office is making arrangements with the insurance underwriters to issue an indorsement on the insurance certificates changing the date from September 7 to September 3.

(sgd.) E. C. THOMPSON
Export Department

E. C. Thompson/jy
cc: H. C. Crout
M. R. Rosse
Files

Plaintiffs' Exhibit 1 (In Part).

Schedule Z.

THE NATIONAL CITY BANK OF NEW YORK
55 Wall Street
New York 15, N. Y.

New York, August 19, 1948

Confirmed Irrevocable Straight Credit
W. A. BARTLE, Care Colorado Fuel & Iron Corporation
1616 Eye Street
Washington, D. C.

Dear Sirs:

. . . . . .

Full set on board ocean bills of lading showing freight prepaid and made out to the order of the National City Bank of New York and/or to order and blank endorsed, dated latest October 10, 1948, all negotiable copies required. Through railway bills of lading are unacceptable.

. . . . . .

Yours very truly,

THE NATIONAL CITY BANK OF NEW YORK
(Signed)

Plaintiffs' Exhibit 1 (In Part).

Schedule AH.

THE NATIONAL CITY BANK OF NEW YORK
55 Wall Street
New York 15, N. Y.

New York, August 26, 1948

Confirmed Irrevocable Straight Credit
Colorado Fuel & Iron Corporation
500 Fifth Avenue
New York, New York

Dear Sirs:

* * * * * *

Full set on board ocean bills of lading showing freight prepaid and made out to the order of the National City Bank of New York and/or to order and blank endorsed, dated latest September 22, 1948, all negotiable copies required. Through railway bills of lading are unacceptable.

* * * * * *

Yours very truly,

THE NATIONAL CITY BANK OF NEW YORK
(Signed)

No. 391 LIBRARY SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 20 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24016

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

Plaintiffs-Appellants,

against

THE COLORADO FUEL AND IRON CORPORATION, ISBRANDTSEN COMPANY, INC.,

Defendants-Appellees,

and

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Defendant-Appellee-Appellant.

(Civil Action No. 62-10)

APPENDIX TO BRIEF OF DEFENDANT-APPELLEE, ISBRANDTSEN COMPANY, INC.

On Appeal from the United States District Court for the Southern District of New York

Lord, Day & Lord,
Attorneys for Defendant-Appellee
Isbrandtsen Company, Inc.,
No. 25 Broadway,
New York 4, N. Y.

Woodson D. Scott,
of Counsel.

UNITED STATES COURT OF APPEALS
FEB 28 1957
SECOND CIRCUIT
A. DANIEL FUSARO, CLERK

INDEX

	PAGE
Relevant Docket Entries	1a
Complaint	3a
Answer of Defendant Isbrandtsen Company, Inc.	14a
Plaintiffs' Notice to Amend Complaint	32a
Defendant Isbrandtsen's Notice to Amend Answer, dated December 30, 1954	34a
Defendant Isbrandtsen's Notice to Amend Answer, dated January 4, 1955	36a
Transcript of Testimony	39a
Motions to Dismiss	73a

TESTIMONY

Plaintiffs' Witness:

Cyril F. Powers,	
Direct	49a
Cross	49a

Defendant's, Colorado Fuel and Iron Corp., Witness:

Frederick R. Becker, Jr.,	
Direct	53a
Cross	56a

Defendant's, Isbrandtsen Company, Inc., Witnesses:

Matthew S. Crinkley,	
Direct	60a
Siguard E. Simpson, Jr.,	
Direct	62a
Cross	66a
Re-direct	70a
Re-cross	72a

EXHIBITS

Plaintiffs' Exhibits:

2—(In Part) (Badhwar Deposition) 76a
Exhibit C, Letter dated November 27, 1950 .... 81a
3—(In Part) (Masse Deposition) 82a
Exhibit 2, Mate's Daily Report 97a
4—(In Part) (Dalton Deposition) 98a
Exhibit A, Port Log 102a
Exhibit 3, Letter dated September 2, 1948 ..... 108a
Exhibit F, Bill of Lading 144 ..... 117a
Exhibit H, Bill of Lading 145 ..... 125a
5—(In Part) (Kacocha Deposition) 128a
18—(In Part) (Smooth Deck Log) 134a

Defendant Isbrandtsen's Exhibits:

B—Actual Schedule, S. S. Hawaiian 136a
H—Letter, dated December 10, 1948 ..... 137a
I—Certificate of Loading 138a
J—Certificate of Loading Covering Specific Cargo .. 140a

United States Court of Appeals
FOR THE SECOND CIRCUIT

R. S. Dass Badhwar and R. B. Lachhmandass Mohanlal & Sons, Ltd., composing the co-partnership doing business under the firm name and style of Mulkraj Brothers and Badhwar,

Plaintiffs-Appellants,

against

The Colorado Fuel and Iron Corporation, Isbrandtsen Company, Inc.,

Defendants-Appellees,

and

American-Hawaiian Steamship Company,

Defendant-Appellee-Appellant.

Civil Action No. 62-10

Relevant Docket Entries.

Date	
Oct. 26-50	Filed Complaint and issued Summons
Nov. 1-50	Served R. F. Pierce, Treasurer of Isbrandtsen Co., Inc. on 10-27-50
Nov. 17-50	Filed Notice of Appearance (Isbrandtsen Co., Inc.)
Nov. 17-50	Filed Stipulation and Order extending time to answer to 12-6-50, Ryan, J.

Relevant Docket Entries.

Date	
Nov. 30-50	Filed Stipulation and Order for taking deposition of R. S. Dass Badhwar on 11-30-50, etc., Noonan, J.
Dec. 5-50	Filed Stipulation and Order extending time to answer of Isbrandtsen to 1-16-51, Sugarman, J.
Dec. 11-50	Filed Affidavit and Notice of Motion to limit examination of R. S. Dass Badhwar—Denied, except as indicated upon argument. So Ordered, Sugarman, J.
Jan. 11-51	Filed Answer of Isbrandtsen Co., Inc.
Mar. 6-51	Filed Isbrandtsen's answer to plaintiffs' request for admissions
Mar. 6-51	Filed Isbrandtsen's answer to cross claim of American-Hawaiian Steamship Company
Nov. 8-54	Filed Answer of Isbrandtsen to plaintiffs' request for admissions
Nov. 23-54	Filed plaintiff's request for admissions (Isbrandtsen Co. Inc.)
Jan. 3-55	Filed Notice of defendant Isbrandtsen Co. Inc. to amend answer upon trial
Jan. 5-55	Filed Notice of defendant Isbrandtsen Co. Inc. to amend answer upon trial
Sep. 12-55	Filed Opinion No. 22138 dismissing complaint and cross-claim. Submit judgment, Ryan, J.
Sep. 21-55	Filed Judgment of dismissal of complaint and of cross-claim of defendant American-Hawaiin against Isbrandtsen Co. Inc., Ryan, J. Judgment entered 9-21-55

Complaint.

(492)

Plaintiffs, by DUNN & ZUCKERMAN, Esqs., their attorneys, as and for their complaint herein, respectfully allege upon information and belief:

FOR A FIRST CAUSE OF ACTION, RELATING TO DEFENDANT, THE COLORADO FUEL AND IRON CORPORATION

1. That at all the times herein mentioned:

(a) Plaintiff R. S. Dass Badhwar was and is a citizen and resident of the Republic of India;

(b) Plaintiff R. B. Lachhmandass Mohanlal & Sons, Ltd. was and is a limited company or corporation organized under the laws of The United Provinces, a province of and in the Republic of India, and doing business in said province and country, and whose shareholders, directors and managing agents are citizens and residents of the Republic of India; and that said plaintiff and plaintiff Badhwar, as co-partners, did and do (493) compose the firm known as Mulkraj Brothers and Badhwar, a partnership registered under the laws of said province and doing business in said province and country;

(c) Defendant The Colorado Fuel and Iron Corporation (hereinafter referred to as "Colorado") was and is a corporation organized under the laws of the State of Colorado, United States of America, and doing business in the County, City and State of New York;

(d) Defendant Isbrandtsen Company, Inc. (hereinafter referred to as "Isbrandtsen") was and is a corporation organized under the laws of the State of New York, United States of America, and doing business in the County, City and State of New York;

(e) Defendant American-Hawaiian Steamship Company (hereinafter referred to as "American-Hawaiian") was and is a corporation organized under the laws of the State of New Jersey, United States of America, and doing business in the County, City and State of New York;

(f) The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. That during the month of August, 1948, the plaintiffs and the defendant Colorado entered into an agreement in writing, by the terms of which said defendant sold and plaintiffs purchased 2000 long tons of caustic soda, solid, 76% alkalinity N. Y. & L. Test, packed in steel drums, for the agreed price of 9½¢ per pound, C.I.F. Bombay, India; that said agreement required said defendant to ship the said caustic soda from a port in the Gulf of Mexico, U.S.A. to plaintiffs at Bombay, India not later than September 22, 1948; and that said agreement required plaintiffs to make payment to said defendant by irrevocable letter of credit in favor of said defendant payable in U. S. dollars.

3. That plaintiffs duly performed all the terms and conditions of the said agreement on their part.

(494) 4. That the defendant Colorado breached said agreement in that it failed to place the said caustic soda on a vessel or vessels which could be reasonably expected to travel over the usual course to Bombay, India and to make the passage from New Orleans, La. in the usual time, but on the contrary, on or about or between August 31, 1948 and September 3, 1948, said defendant caused said caustic soda to be placed on board a vessel that was then subject to a threatened or actual strike or strikes of the officers and crew against the owners thereof, and which vessel was then immobilized and the movement and uses

of which were affected by and subject to all of the concomitant factors and consequences of said strike situation; that said threatened or actual strikes were of an organized nature called and directed by labor unions which controlled operating personnel and crew members essential to the movement of said vessel and to its use as a common carrier, and which threatened or actual strike or strikes carried with them the support of other unions controlling amongst them other personnel essential to the operation of said vessel; all of which was well known, or should have been well known to said defendant Colorado.

5. That at the time when said defendant placed the caustic soda aboard said vessel, said defendant did not or could not reasonably expect the said vessel to depart in the ordinary and usual time and manner and to make the voyage from New Orleans, La., U.S.A., to Bombay, India in the period of time usual and ordinary for said trip; that at the time when said defendant Colorado placed the caustic soda upon said vessel, it knew or should have known that the said merchandise could not reasonably be expected to arrive at Bombay, India within the time contemplated by the parties to the aforesaid agreement.

6. That the said vessel did not depart from New Orleans, La. until on or about December 19, 1948, and did not (495) arrive at Bombay, India until on or about February 28, 1949; that the said caustic soda remained aboard the said vessel from its loading thereon until the vessel's arrival at Bombay, India, and was not delivered to plaintiffs at Bombay, India until some time thereafter; that the said caustic soda did not arrive at Bombay, India within the time contemplated by the said agreement between plaintiffs and said defendant, nor within a reasonable time.

7. That immediately upon placing the said caustic soda aboard said vessel, defendant Colorado drew upon plain-

tiffs' letters of credit and received therefrom the sum of $317,375.53.

8. That by reason of the foregoing, plaintiffs suffered damage in the amount of $138,058.30.

FOR A SECOND CAUSE OF ACTION, RELATING TO ALL THREE DEFENDANTS, JOINTLY AND IN THE ALTERNATIVE

9. Plaintiffs repeat, reiterate and reallege each and every allegation contained in the paragraphs designated "1" and "2" of this complaint with the same force and effect as if here fully set forth at length.

10. That in accordance with the said agreement, plaintiffs on or about August 18, 1948, duly established an irrevocable letter of credit in favor of defendant Colorado for the amount of $239,000.00, through the National City Bank of New York.

11. That the said letter of credit provided for shipment of caustic soda by defendant Colorado to plaintiffs at Bombay, India from a Gulf of Mexico port, U.S.A., not later than September 22, 1948.

12. That in accordance with the said agreement and pursuant to the request of defendant Colorado, plaintiffs on or (496) about August 25, 1948, duly established another irrevocable letter of credit in favor of said defendant for the amount of $186,600.00 through the National City Bank of New York.

13. That the said letter of credit provided for shipment of caustic soda by said defendant Colorado to plaintiffs

at Bombay, India from a Gulf of Mexico, U.S.A. port not later than October 10, 1948.

14. That at all times herein mentioned defendants Isbrandtsen and American-Hawaiian were and are engaged in business as common carriers for hire.

15. Upon information and belief, that during August 1948, defendant Isbrandtsen entered into an agreement with defendant American-Hawaiian whereby defendant Isbrandtsen, for a valuable consideration, chartered cargo space aboard the S. S. HAWAIIAN, a vessel owned and operated by defendant American-Hawaiian.

16. That defendants caused said S. S. HAWAIIAN to proceed to New Orleans where it docked at Westwego Wharf No. 3 on August 31, 1948 at approximately 12:30 P.M. and thereafter commenced loading caustic soda consigned by defendant Colorado to plaintiffs at Bombay, India.

17. That the master, mates, officers and crew of the said vessel, S. S. HAWAIIAN, were employed by and were under the direction and control of defendant American-Hawaiian.

18. That at the time when defendants Isbrandtsen and American-Hawaiian entered into their charter agreement and at the time when the said S. S. HAWAIIAN arrived at New Orleans, La., and the loading of the caustic soda was commenced, the ship's officers and the members of the ship's crew were laboring, performing their duties and rendering services pursuant to injunctions or mandates of United States District Courts made (497) and issued pursuant to the terms and provisions of acts of Congress, more specifically the "Labor Management Relations Act, 1947", popularly termed "The Taft-Hartley Act" (U.S.C.A., Title 29, Sec. 141 et seq.).

19. That the said injunctions or mandates were issued by the United States District Courts on or about June 14, 1948, to prevent the cessation of work by said ship's personnel and others under strikes threatened, declared, or existing, on the part of organized labor unions controlling said personnel and others, and were effectual and enforcible until 10:00 A. M. September 2, 1948, and their force and effect expired at said time.

20. That at the time when the loading of the said caustic soda aboard the said S. S. HAWAIIAN was commenced, the defendants, their agents, servants and employees well knew of the issuance of the said mandates or injunctions by the United States District Courts, their terms and conditions, and their time for expiration.

21. That at 10:00 A.M. on September 2, 1948 upon the expiration of said mandates or injunctions, two unions, including in their membership personnel essential to the movement and operation of said vessel as a common carrier, were on strike against the said owner thereof, without legal impediment to a work stoppage.

22. That on September 2, 1948 at approximately 10:30 A.M. officers and members of the crew of said S. S. HAWAIIAN, who were members of said striking unions, ceased the performance of their duties and left the ship, rendering the ship unable to be used as a carrier.

23. That the loading of caustic soda consigned to plaintiffs was continued after the time mentioned in the preceding paragraph.

(498) 24. That such loading was continued during the night of September 2nd-3rd, 1948.

25. That picket lines were established at approximately 10:00 A.M. on September 3, 1948 at which time all loading ceased by virtue of the co-operative action of labor unions in support of said strikes.

26. That under date of September 3, 1948 defendant Isbrandtsen issued to defendant Colorado an "on board bill of lading" for said merchandise consigned to plaintiffs, which Colorado immediately used to obtain from said bank the sum of $317,375.53 from the avails of said letters of credit; that Colorado paid Isbrandtsen freightage to Bombay on said caustic soda.

27. That defendants, their agents, servants, and employees had knowledge of the said strike situation and of the imminence of complete immobilization of the ship at the time they commenced loading the merchandise consigned to plaintiffs and prior thereto, and that they continued loading in spite of the actual existence of a strike on the part of officers and crew of said vessel and with full knowledge that the ship was without operating personnel and could not reasonably be expected to sail upon the completion of said loading and that such actions on their part were taken upon their own initiative, and without notifying or consulting plaintiffs, and in careless, negligent and wanton disregard of plaintiffs' rights and interests in the premises.

28. That by reason of the foregoing the said goods consigned to plaintiffs under their said contract with defendant Colorado remained inaccessible in said vessel which remained immobilized at New Orleans until December 9, 1948 when said strikes were terminated, and which remained an additional period (499) of time at said port and put in at one or more other ports or places to take or add cargo to replace shipments which had been can-

celled or recalled due to said immobilization and delay, and did not reach Bombay, India until on or about February 28, 1949, a date far subsequent to the date when said goods would reasonably be expected to arrive at Bombay.

29. That such conduct on the part of defendant Colorado was careless, negligent and in violation of its duties toward plaintiffs under said contract and its duties of reasonable care in the performance of contractual obligations, and said defendant was otherwise negligent in the premises.

30. That such conduct on the part of defendants Isbrandtsen and American-Hawaiian was careless, negligent and in violation of their duties as common carriers in the premises, in that they procured and furnished said ship under the circumstances aforestated, and actively participated in the loading aboard said strikebound ship of merchandise consigned to plaintiffs while they knew or should have known that said ship was or would be immobilized and unable to be used as a carrier of said merchandise under normal conditions, and in that defendant Isbrandtsen carelessly, negligently and wantonly issued an "on board bill of lading" to defendant Colorado which enabled the latter to draw upon the aforesaid letters of credit and obtain from the avails thereof the sum of $317,375.53, and in that the said Isbrandtsen and American-Hawaiian caused said vessel to delay still further in proceeding to Bombay after the termination of said strikes as aforestated, and in that said Isbrandtsen and American-Hawaiian failed to transport said merchandise to Bombay, India over the usual course and within a reasonable time after the receipt and acceptance thereof, and said defendants were otherwise negligent in the premises.

(500) 31. That by reason of the negligence of defendants as aforestated plaintiffs were damaged in the sum of $138,058.30.

FOR A THIRD CAUSE OF ACTION, RELATING TO ALL THREE DEFENDANTS JOINTLY AND IN THE ALTERNATIVE

32. Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs designated "1" and "2", "10" to "26" inclusive, and "28" with the same force and effect as if here set forth at length.

33. That the aforestated actions on the part of defendants were taken wilfully, deliberately, and with knowledge of the aforestated facts and in pursuit of a common design to place said merchandise aboard the said immobilized vessel and to bring about the utterance of an "on board bill of lading" for the purpose of enabling defendant Colorado to draw upon said letters of credit as aforestated and to charge plaintiffs with the contract price and freightage of said merchandise and to avoid losses by any of the defendants under their respective contracts and obligations and for other purposes of the respective defendants and to fasten upon plaintiffs all losses and consequences of said actions, and were in fraud of the plaintiffs, whose funds in the sum of $317,375.53 were thus secured from the said bank by false pretenses, fraudulent concealment of the facts aforestated and fraudulent use of a document purporting to be a valid on board bill of lading to evidence a due and proper shipment of the merchandise contrary to the actual facts.

34. That by reason thereof plaintiffs suffered loss and damage in the sum of $138,058.30.

FOR A FOURTH CAUSE OF ACTION, RELATING TO DEFENDANTS ISBRANDTSEN COMPANY, INC. AND AMERICAN-HAWAIIAN STEAMSHIP COMPANY, JOINTLY AND IN THE ALTERNATIVE

(501) 35. Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs designated

"1", "2" and "14" to "26" inclusive with the same force and effect as if here set forth at length.

36. That under date of September 3, 1948 defendant Isbrandtsen issued to defendant Colorado an "on board bill of lading" for said merchandise consigned to plaintiffs.

37. That thereafter defendants Isbrandtsen and American-Hawaiian held said merchandise consigned to plaintiffs on said immobilized vessel at New Orleans until some time in December, 1948; that when said vessel ceased to be immobilized said defendants caused her to remain in and about New Orleans for a considerable additional time and caused her to deviate from her route to Bombay to proceed to Tampa, Florida and other places all to procure additional cargo to replace shipments cancelled or recalled due to said immobilization and delay, or otherwise to serve the use and benefit of said defendants.

38. That said defendants, as aforestated, did place aboard their said vessel the said merchandise and did not transport it to Bombay, India by the usual course or within a reasonable time.

39. That by their conduct aforestated defendants did convert to their own use and benefit the said merchandise consigned to plaintiffs, to plaintiffs' damage in the sum of $138,058.30.

FOR A FIFTH CAUSE OF ACTION, AGAINST DEFENDANT COLORADO OR, IN THE ALTERNATIVE, ISBRANDTSEN AND AMERICAN-HAWAIIAN JOINTLY AND IN THE ALTERNATIVE

40. That defendant Colorado wilfully or negligently included in said shipment 526 damaged drums of caustic soda and defendants Isbrandtsen and American-Hawaiian accepted same, and all three caused same to be loaded aboard the aforesaid ship and (502) defendant Isbrandtsen

issued an on board bill of lading without exception and defendant Colorado collected full payment, C.I.F., for said portion of the shipment by drawing on said letters of credit as aforesaid.

41. In the alternative, that defendants Isbrandtsen and American-Hawaiian loaded, stowed, carried, transported, moved and handled 526 drums of said caustic soda in such hasty, improper, unskillful, unusual, careless and negligent manner that a great part of the contents thereof was lost, damaged or destroyed.

42. That by reason thereof plaintiffs suffered damage in the sum of $7,636.00.

WHEREFORE, plaintiffs demand judgment:

(I) For the sum of $138,058.30.

(a) Against defendant Colorado on the first three causes of action or any of them;

(b) Against defendants Isbrandtsen and American-Hawaiian or either of them, on the second, third and fourth causes of action or any of them.

(II) For the sum of $7,636.00 against defendants Colorado, Isbrandtsen and American-Hawaiian, or any of them, on the fifth cause of action.

(III) For appropriate interest and costs.

DUNN & ZUCKERMAN,
Attorneys for Plaintiffs.

Answer of Defendant Isbrandtsen Company, Inc.

(531)

Defendant Isbrandtsen Company, Inc. by Lord, Day & Lord, its attorneys, for its answer to the complaint herein, on information and belief:

REFERRING TO THE FIRST CAUSE OF ACTION, INCLUDING PARAGRAPHS "1" TO "8", INCLUSIVE, OF THE COMPLAINT:

1. Defendant Isbrandtsen Company, Inc. makes no answer to the First Cause of Action as same does not relate to this defendant.

ANSWERING THE SECOND CAUSE OF ACTION, INCLUDING PARAGRAPHS "9" TO "31", INCLUSIVE, OF THE COMPLAINT:

2. Denies that it has any knowledge or information sufficient to form a belief respecting the allegations contained in paragraphs "1(a)", "(b)", "(c)" and "(e)"; denies the allegations contained in paragraph "1(f)"; and denies (532) that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph "2", as said paragraphs are repeated, reiterated and re-alleged in paragraph "9" of the complaint.

3. Denies that it has any knowledge or information sufficient to form a belief respecting the allegations contained in paragraphs "10", "11", "12", "13", "18", "19" and "25" of the complaint.

4. Denies each and every allegation contained in paragraphs "21", "22", "27", "28", "29", "30" and "31" of the complaint.

5. Admits that on or about August 17, 1948, defendant Isbrandtsen Company, Inc. entered into a time charter agreement, on the usual Government form approved by the New York Produce Exchange, with defendant American-Hawaiian Steamship Company, for a valuable consideration, relating to the S.S. HAWAIIAN, a vessel at that time owned and operated by defendant American-Hawaiian Steamship Company, and, except as so admitted, denies the other allegations contained in paragraph "15" of the complaint.

6. Admits that the S.S. HAWAIIAN arrived at Westwego Wharf No. 3, New Orleans, Louisiana, on or about August 31, 1948, and that loading on board said vessel of caustic soda consigned to order of The National City Bank of New York, New York City, N. Y., or assigns, port of discharge from ship Bombay, India, was commenced on or about said date; and, except as so admitted, denies the other allegations contained in paragraph "16" of the complaint in (533) so far as same relate to defendant Isbrandtsen Company, Inc., and denies that it has any knowledge or information sufficient to form a belief as to the allegations of said paragraph relating to the other defendants.

7. Denies the allegations contained in paragraph "20" of the complaint in so far as same relate to defendant Isbrandtsen Company, Inc., and, except as so denied, denies that it has any knowledge or information sufficient to form

a belief as to the allegations of said paragraph relating to the other defendants.

8. Admits that the loading of caustic soda continued after 10:30 A. M., September 2, 1948, and during part of the night of September 2, 1948; and, except as so admitted, denies the other allegations contained in paragraphs "23" and "24" of the complaint.

9. Admits that defendant Isbrandtsen Company, Inc. issued two bills of lading dated September 3, 1948, Nos. 144 and 145, covering certain drums said to contain caustic soda consigned to order of The National City Bank of New York, New York City, N. Y., or assigns, port of discharge Bombay, India, shipper The Colorado Fuel & Iron Corporation; and, except as so admitted, denies the other allegations contained in paragraph "26" of the complaint.

ANSWERING THE THIRD CAUSE OF ACTION, INCLUDING PARAGRAPHS "32" TO "34", INCLUSIVE, OF THE COMPLAINT:

10. Answering paragraph "32" of the complaint, repeats, reiterates and re-alleges the admissions, denials (534) and allegations contained in paragraphs "2" to "9", inclusive, of this answer relating to paragraphs "1", "2", "10" to "26", inclusive, and "28" of the complaint, as repeated, reiterated and re-alleged in paragraph "32" of the complaint, with the same force and effect as if herein again set forth in full.

11. Denies each and every allegation contained in paragraphs "33" and "34" of the complaint.

Answer of Defendant Isbrandtsen Company, Inc.

ANSWERING THE FOURTH CAUSE OF ACTION, INCLUDING PARAGRAPHS "35" TO "39", INCLUSIVE, OF THE COMPLAINT:

12. Answering paragraph "35" of the complaint, repeats, reiterates and re-alleges the admissions, denials and allegations contained in paragraphs "2" to "9", inclusive, of this answer relating to paragraphs "1", "2", and "14" to "26", inclusive, of the complaint, as repeated, reiterated and re-alleged in paragraph "35" of the complaint, with the same force and effect as if herein again set forth in full.

13. Admits that defendant Isbrandtsen Company, Inc. issued two bills of lading dated September 3, 1948, Nos. 144 and 145, covering certain drums said to contain caustic soda consigned to order of The National City Bank of New York, New York City, N. Y., or assigns, port of discharge Bombay, India, shipper The Colorado Fuel & Iron Corporation, and, except as so admitted, denies the other allegations contained in paragraph "36" of the complaint.

14. Denies each and every allegation contained in paragraphs "37", "38" and "39" of the complaint.

(535) ANSWERING THE FIFTH CAUSE OF ACTION, INCLUDING PARAGRAPHS "40" TO "42", INCLUSIVE, OF THE COMPLAINT:

15. Denies the allegations relating to defendant Isbrandtsen Company, Inc. contained in paragraph "40" of the complaint, and denies that this defendant has any

knowledge or information sufficient to form a belief as to the allegations of said paragraph relating to the other defendants.

16. Denies each and every allegation contained in paragraphs "41" and "42" of the complaint.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE TO EACH OF THE SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

17. The Second, Third, Fourth and Fifth alleged causes of action each fails to state a claim against defendant Isbrandtsen Company, Inc. upon which relief can be granted.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE TO EACH OF THE SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

18. At the times mentioned in the complaint, the S.S. HAWAIIAN was a general ship engaged in the common carriage of goods by water for hire; said vessel was owned by defendant American-Hawaiian Steamship Company, and operated under a time charter agreement, on the usual Govern- (536) ment form approved by the New York

Produce Exchange, between defendant Isbrandtsen Company, Inc. and defendant American-Hawaiian Steamship Company. Said S.S. HAWAIIAN arrived at Westwego Wharf No. 3, New Orleans, Louisiana, on or about August 31, 1948.

19. On or about August 31, September 1 and September 2, 1948, at New Orleans, Louisiana, there were delivered to the S.S. HAWAIIAN, as common carrier, the shipments listed below, in apparent good order and condition, said to contain drums of caustic soda (quality, quantity, contents and value unknown), as follows:

Covered by B/L No. 144, dated September 3, 1948, showing freight prepaid, 3,217 Drums Caustic Soda 76% Solid (N. Y. & L.), with marks and numbers Mulkraj Lucknow via Bombay Nos. 1/3217 made in U. S. A., shipper The Colorado Fuel & Iron Corporation, consigned to order of The National City Bank of New York, New York City, N. Y., or assigns.

Covered by B/L No. 145, dated September 3, 1948, showing freight prepaid, 1,582 Drums Caustic Soda 76% Solid (N. Y. & L.), with marks and numbers Mulkraj Lucknow via Bombay Nos. 3218/4799, shipper The Colorado Fuel & Iron Corporation, consigned to order of The National City Bank of New York, New York City, N. Y., or assigns.

Said shipments to be carried by the S.S. HAWAIIAN to the port of Bombay, and there to be delivered as specified in said bills of lading, in consideration of certain freight charges then paid or agreed to be paid, and subject to all the terms, conditions and exceptions of said bills of lading (Nos. 144 and 145), issued in the name of defendant Isbrandtsen Company, Inc. as agents for the Master of

said vessel, by Hansen & Tidemann, Inc., and accepted by the shipper as the contract of carriage, to the originals of which this defendant refers for greater certainty as to their terms, conditions and exceptions, and same are made a part of (537) this, its answer.

20. Said bills of lading were issued in the regular course of business, after the goods referred to therein were on board said vessel, and the originals thereof were delivered by Hansen & Tidemann, Inc. to the shipper or its representative in regular course, according to the usual custom and practice in such matters.

21. The S.S. HAWAIIAN proceeded to Bombay in due course, arriving on or about February 25, 1949, where delivery of said shipments thereafter was made from said vessel to the Bombay Port Trust as provided by law and custom at the Port of Bombay, on or about March 6, 7, 8, 9 and 10, 1949, in accordance with the terms, conditions and exceptions of the covering bills of lading, and thereafter said shipments were received, accepted and retained by the consignees or plaintiffs as the persons authorized to receive, accept and retain same on the order of the consignees, or as their assigns, from the Bombay Port Trust, without any exception as to time, place, quantity, condition or otherwise, and without notice to or knowledge of this defendant of the claims alleged in the complaint or any part thereof.

22. Any delay which may have occurred in the sailing of said vessel from the Port of New Orleans, or from any other port, or any delay which may have occurred in the arrival of said vessel at the Port of Bombay or in the delivery of said goods in accordance with the terms,

(538) conditions and exceptions of said bills of lading, into the custody of the Bombay Port Trust, and thereafter by the Bombay Port Trust to plaintiffs, resulted from strikes, work stoppages or other labor difficulties, or from other causes beyond the control of this defendant, and for which this defendant was not and is not responsible, or liable to plaintiffs in this action.

23. By reason of the foregoing, if any loss or damage resulted to said goods, or to plaintiffs, this defendant is under no liability therefor.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO EACH OF THE SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

24. The United States Carriage of Goods by Sea Act, approved April 16, 1936, to which said shipment was subject, provides in Section 4(2) as follows:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

* * *

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of War;

* * *

(539) (g) Arrest or restraint of princes, rulers, or people—

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; * * *

* * * *

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

25. If any damage or loss resulted to any of said drums or the contents thereof during said voyage, or while in the custody of said vessel or of this defendant, or to plaintiffs in connection with said voyage, same was due to one or more of the causes above set forth, and by reason thereof this defendant is under no liability therefor.

Answer of Defendant Isbrandtsen Company, Inc.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE TO EACH OF (540) THE SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

26. The bills of lading covering said shipments contained in paragraph "3" thereof the following terms, conditions and exceptions, to which said shipments were subject, to wit:

"3. The scope of voyage herein contracted for shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the ship may sail beyond the port of discharge or in a direction contrary thereto or return to the original port, or depart from the direct or customary route, and includes all canals, straits and other waters. The ship may call at any port for the purposes of the current voyage or of a prior or subsequent voyage. The ship may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may for matters occurring before loading the goods, known or unknown at the time of such loading and matters occurring after such loading, either with or without the goods or passengers on board, and before or after proceeding toward the port of discharge, adjust compasses, dry dock, with or without cargo aboard go on ways or to repair yards, shift berths, make trial trips or tests, take fuel or stores, remain in port, sail with or without pilots, tow and be towed, and save or attempt to save life or property; and all of the foregoing are included in the contract voyage."

27. By reason of the foregoing, if any loss or damage resulted to said goods or to plaintiffs, this defendant is under no liability therefor.

(541) FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE TO EACH OF THE SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

28. Before and at the beginning of said voyage of the S.S. HAWAIIAN, due diligence was exercised to make the ship seaworthy, to properly man, equip and supply the ship, to make the holds and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation; and said goods were properly and carefully loaded, handled, stowed, carried, kept, cared for and discharged.

29. By reason of the foregoing, if any loss or damage arose or resulted to said goods, or to plaintiffs, this defendant is under no liability therefor.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A SIXTH SEPARATE AND COMPLETE DEFENSE TO THE FIFTH CAUSE OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC., ALLEGES ON INFORMATION AND BELIEF:

30. The bills of lading covering said shipments contained in paragraph "1" thereof the following terms, conditions and exceptions, to which said shipments were subject, to wit:

"The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or mis-delivery,

or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier."

31. By reason of the foregoing, if any loss or damage resulted to said goods, same occurred, or resulted (542) from matters occurring, prior to loading same on board said ship or after discharge therefrom, while the goods were not in the actual custody of the carrier, and this defendant is under no liability therefor.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE TO THE FIFTH CAUSE OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

32. The bills of lading covering said shipments contained in paragraph "12" thereof the following terms, conditions and exceptions, to which said shipments were subject, to wit:

"12. The port authorities are hereby authorized to grant a general order for discharging immediately upon arrival of the ship and the Carrier without giving notice either of arrival or discharge, may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the Carrier may select, and continuously Sundays and holidays included, at all such hours by day or by night as the Carrier may determine no matter what the state of the weather or custom of the port may be. The Carrier shall not be liable in any respect whatsoever if heat or refrigeration or special cooling facilities shall not be furnished during loading or discharge or any part of the time that the goods are upon the wharf, craft, or other loading or discharging place. All lighterage and use of craft in discharging shall be at the risk and

expense of the goods. Landing and delivery charges and pier dues shall be at the expense of the goods unless included in the freight herein provided for. If the goods are not taken away by the consignee by the expiration of the next working day after the goods are at his disposal, the goods may at Carrier's option and subject to Carrier's lien, be sent to store or warehouse or be permitted to lie where landed, but always at the expense and (543) risk of the goods. The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. The Carrier shall not be required to give any notification of disposition of the goods."

33. By reason of the foregoing, if any loss or damage resulted to said goods, same occurred, or resulted from matters occurring, while said goods were at their own expense and risk in every respect, and this defendant is under no liability therefor.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR AN EIGHTH SEPARATE AND COMPLETE DEFENSE TO THE FIFTH CAUSE OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

34. Plaintiffs failed to make any inventory of the alleged loss or damage to them or to said cargo at the Port of Bombay when same was discharged from said vessel, failed to request a proper inspection or joint survey thereof, failed to comply with the by-laws, rules and regulations of the Bombay Port Trust in such cases made and provided, and failed to comply with the custom at the Port of Bombay for an inventory of any such loss or

damage to be made and a proper inspection or joint survey thereof to be requested or made at or about the time of discharge of the cargo and before delivery to or receipt thereof by the consignees or their agents, representatives or assigns.

35. By reason of the foregoing, if any loss or damage resulted to said cargo, this defendant is under no (544) liability therefor.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A NINTH SEPARATE AND COMPLETE DEFENSE TO EACH OF THE SECOND, THIRD, FOURTH AND FIFTH CAUSES OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

36. The bills of lading covering said shipments contained in paragraphs "18" and "19" thereof the following terms, conditions and exceptions, to which said shipments were subject, to wit:

"18. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery. The Carrier shall not be liable upon any claim for loss or damage unless written particulars of such claim shall be received by the Carrier within thirty days after receipt of the notice herein provided for.

"19. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

37. Notice of loss or damage and the general nature of such loss or damage was not given in writing to (545) the carrier or its agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage; nor was any such notice given, respecting any loss or damage not apparent, within three days of the delivery; written particulars of the claim respecting said cargo were not received by the carrier within thirty days after receipt of notice of loss or damage as required by paragraph "18" of said bills of lading; and suit was not brought within one year after delivery of the goods or the date when the goods should have been delivered.

38. By reason of the foregoing, if any loss or damage resulted to said cargo or to plaintiffs, this defendant is under no liability therefor.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR A TENTH SEPARATE AND COMPLETE DEFENSE TO EACH OF THE SECOND, THIRD AND FOURTH CAUSES OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

39. Repeats, reiterates and re-alleges the allegations contained in paragraphs "18" to "20", inclusive, of this answer, with the same force and effect as if herein again set forth in full.

Answer of Defendant Isbrandtsen Company, Inc.

40. Said goods were delivered to said vessel at the Port of New Orleans on or about August 31, September 1 and September 2, 1948, and thereafter said vessel proceeded from the Port of New Orleans to the Port of Bombay without unreasonable delay, arriving at Bombay on or about February (546) 25, 1949.

41. Neither the consignees of said goods, nor plaintiffs, notified this defendant, either before said goods were received on board said vessel, or thereafter, that failure of said goods to arrive at Bombay before the date in February on which said vessel did arrive would cause to the consignees or to plaintiffs any damage. During the time said cargo was in the custody of this defendant or said vessel, this defendant received no request from the consignees or plaintiffs respecting the time of sailing of said vessel from New Orleans or any other port, the position of said vessel, or the date of arrival of said vessel at the Port of Bombay, or the sending of said cargo by any other vessel, and neither the consignees, nor plaintiffs, notified this defendant of any damage plaintiffs would sustain by reason of the time consumed in the carriage of said goods from the Port of New Orleans to the Port of Bombay in said vessel.

42. After the arrival of said vessel at Bombay on or about February 25, 1949 as aforesaid, the delivery of said goods thereafter was made from said vessel to the Bombay Port Trust on or about March 6, 7, 8, 9 and 10, 1949, in accordance with the terms, conditions and exceptions of the covering bills of lading, and thereafter said shipments were received, accepted and retained by plaintiffs, from the Bombay Port Trust, without any complaint respecting the time said goods arrived at Bombay or the time they were received by plaintiffs, and without notice to or knowledge of this defendant of the claims alleged in the complaint or any part thereof.

(547) 43. By reason of the foregoing, the plaintiffs waived any and all claims relating to alleged delay in the arrival of said goods at Bombay, or damages in connection therewith, and are estopped, and are barred by laches, from asserting same against this defendant in this action.

FURTHER ANSWERING THE COMPLAINT, AND AS AND FOR AN ELEVENTH SEPARATE AND PARTIAL DEFENSE TO THE FIFTH CAUSE OF ACTION, DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

44. The bills of lading covering said shipments contained in paragraph "17" thereof the following terms, conditions and exceptions, to which said shipments were subject, to wit:

"17. • • •

Whenever the value of the goods is less than $500 per package or other freight unit, their value in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less."

45. The value of said goods was less than $500 per package or other freight unit.

46. By reason of the foregoing, if this defendant is liable for any of the loss or damage claimed in the Fifth Cause of Action alleged in the complaint, which it denies, such liability does not exceed in any event the invoice value, plus freight and insurance if paid.

Answer of Defendant Isbrandtsen Company, Inc.

WHEREFORE, defendant ISBRANDTSEN COMPANY, INC. (548) demands judgment dismissing the complaint as against this defendant, together with the costs and disbursements of this action.

Dated: January 10, 1951.

LORD, DAY & LORD,
Attorneys for Defendant
Isbrandtsen Company, Inc.

Plaintiffs' Notice to Amend Complaint.

(Served December 30, 1954)

(1452) Sirs:

PLEASE TAKE NOTICE that at the opening of trial herein, the plaintiffs will move to amend the complaint as follows:

(1) To amend paragraph "2" of the complaint by replacing the date "September 22, 1948" with the date "September 1, 1948".

(2) To eliminate from the complaint paragraphs "11" and "13".

(3) To amend paragraph "22" of the complaint by eliminating the words "at approximately 10:30 A. M. officers and".

(4) To amend paragraphs "8", "31", "34" and "39" of the complaint so that each such paragraph shall read as follows:

> "That the market price of said commodity in the Bombay market at or about the time when it might have been normally expected to arrive and be delivered to plaintiffs, on or before November 20, 1948, was 36 (1453) rupees per cwt. of 112 lbs; that the market price at the time of its actual arrival and receipt by plaintiffs at Bombay in March, 1949, was 25 rupees per cwt; that the landed cost of the commodity to plaintiffs, was approximately 47 rupees per cwt, consisting of the contract price of 34.32 rupees, customs duty of 10.8 rupees and demurrage and incidental charges of approximately 1.88 rupees; that of the said rate of customs duty paid by plaintiffs, 4.32 rupees represented an increase in rate which became effective January 1, 1949. That plaintiffs suffered loss and damage in the premises in the sum of $203,430.57 consisting of the

difference between the landed cost at which they received and took possession of the goods while in ignorance of the wrongful conduct complained of herein, and the market price then prevailing in Bombay, together with interest."

(5) To amend the figure of $138,058.30 in the "WHEREFORE" clause of the complaint to read "$203,430.57".

(6) To amend paragraph "42" of the complaint by adding thereto the following words after the figure of "$7,636.00", to wit: "being the landed cost thereof, of which $3,434.88 is alternative to a like sum embraced in the damages of $203,430.57 alleged in the preceding causes of action, and the remainder, or $4,201.12, is additional to such damages".

(7) To amend the "WHEREFORE" clause of the complaint by replacing the figure "$7636.00" with the following: "$7636.00, of which $3,434.88 is alternative to a like sum embraced in the aforestated damages of $203,430.57 and the remainder, or $4,201.12 is additional thereto".

(1454) Yours, etc.,

DUNN & ZUCKERMAN,
Attorneys for Plaintiffs.

To:

(Addressed to all Attorneys of Record.)

Defendant Isbrandtsen's Notice to Amend Answer, dated December 30, 1954.

(1444) Sirs:

PLEASE TAKE NOTICE that upon the trial of this action the defendant Isbrandtsen Company, Inc. will move to amend its answer by adding two new paragraphs No. 47 and No. 48 thereto as follows:

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A TWELFTH SEPARATE AND COMPLETE DEFENSE TO THE SECOND, THIRD, FOURTH AND FIFTH ALLEGED CAUSES OF ACTION DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

47. That the alleged claims set forth in the second, third, fourth and fifth causes of action arose out of matters occurring in or about September 1948. Said matters occurred, (1445) if at all, in the State of Louisiana where the S. S. HAWAIIAN was then lying afloat within the territorial waters of said State. Said claims, if any, are prescribed by one year under the Louisiana statutes, to wit, Articles 3536 and 3537 of the Louisiana Civil Code, then and now in full force and effect, applicable herein under the provisions of Section 13 of the New York Civil Practice Act, plaintiffs being non-residents of the State of New York.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A THIRTEENTH SEPARATE AND COMPLETE DEFENSE TO THE SECOND, THIRD, FOURTH AND FIFTH ALLEGED CAUSES OF ACTION DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES OF INFORMATION AND BELIEF:

48. That the alleged claims set forth in the second, third, fourth and fifth causes of action arose out of mat-

Defendant Isbandtsen's Notice to Amend Answer, dated December 30, 1954.

ters occurring in or about September 1948. Said matters occurred, if at all, in the State of Louisiana where the S. S. HAWAIIAN was then lying afloat within the territorial waters of said State. The merchandise referred to in the complaint was delivered to said S. S. HAWAIIAN, received on board said vessel, and bills of lading were issued therefor on or about September 3, 1948 at New Orleans, Louisiana. Said claims, if any, are prescribed by the lapse of two years from the date of shipment, under the Statutes of Louisiana, Acts 1914, No. 223 (R. S. 45; 1100), then and now in full force and effect, applicable herein under the provisions of Section 13 of the New York Civil (1446) Practice Act, plaintiffs being nonresidents of the State of New York.

Dated: December 30, 1954.

Yours, etc.,

LORD, DAY & LORD,
Attorneys for Defendant
Isbrandtsen Company, Inc.

To:

(Addressed to all Attorneys of Record.)

Defendant Isbrandtsen's Notice to Amend Answer, dated January 4, 1955.

(1447) Sirs:

Please take notice that upon the trial of this action the defendant Isbrandtsen Company, Inc. will move to amend its answer by adding five new paragraphs Nos. 49 to 53 inclusive thereto as follows:

Further answering the complaint and as and for a fourteenth separate and complete defense to each of the second, third, fourth and fifth alleged causes of action defendant Isbrandtsen Company, Inc. alleges on information and belief:

49. Repeats, reiterates and realleges the allegations contained in paragraphs 18 to 21 inclusive and 40 to 42 inclusive of defendant's answer herein dated January 10, 1951.

50. If it be found that the acceptance and transportation of said cargo or any of the matters alleged in the (1448) complaint constituted negligence, fraud, conversion or other fault of defendant Isbrandtsen Company, Inc., said defendant is under no liability therefor because the shipper and/or the consignees and/or the plaintiffs or their representatives also knew or had equal means of knowledge of the strike of the crew of said vessel or the imminence thereof and were contributorily negligent and participated and acquiesced in the shipment and carriage of said goods, and waived any objections thereto arising out of any of the matters or things alleged in the complaint.

Defendant Isbrandtsen's Notice to Amend Answer, dated January 4, 1955.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FIFTEENTH SEPARATE AND PARTIAL DEFENSE TO EACH OF THE SECOND, THIRD, FOURTH AND FIFTH ALLEGED CAUSES OF ACTION DEFENDANT ISBRANDTSEN COMPANY, INC. ALLEGES ON INFORMATION AND BELIEF:

51. The bills of lading covering said shipments contained in paragraph "17" thereof the following terms, conditions and exceptions, to which said shipments were subject, to wit:

"17. • • •

Whenever the value of the goods is less than $500 per package or other freight unit, their value in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less."

52. The value of said goods was less than $500 per package or other freight unit.

(1449) 53. By reason of the foregoing if this defendant is liable for any of the damages claimed in the first, second, third, fourth and fifth causes of action, which it denies, such liability with respect to any part of said merchandise does not exceed in any event the invoice value, plus freight and insurance, if paid, of any part of said merchandise shipped in said vessel and lost or damaged and not received and accepted by the consignees or plaintiffs or their representatives. If plaintiffs are en-

Defendant Isbrandtsen's Notice to Amend Answer, dated January 4, 1955.

titled to any recovery, which this defendant denies, such recovery should be computed and adjusted and limited in accordance with the above quoted provisions of said bills of lading. In no event may the plaintiffs' damages exceed the limits of recovery provided in the United States Carriage of Goods by Sea Act and as stated in the terms, conditions and exceptions of the aforesaid bills of lading.

Dated: January 4, 1955.

Yours, etc.,

LORD, DAY & LORD,
Attorneys for Defendant
Isbrandtsen Company, Inc.

To:

(Addressed to all Attorneys of Record.)

Transcript of Testimony.

(66) Mr. Dunn: The plaintiff has a notice of intention to amend on December 30, 1954. Perhaps the briefest way would be to hand up the notice and then refer to it.

The Court: I understand that the plaintiff's motion is to amend the complaint as set forth in its notice of motion which was served upon the defendant on December 30, 1954.

Is there any objection from the defendants?

Mr. Bensel: Your Honor, in connection with the proposed amendments 1, 2 and 3, contained in the notice, the purported change is to change a date originally specified as September 22nd to read September 1st. That is under item 1 of his notice.

And then he wants to eliminate the allegations of paragraphs 11 and 13, which you will note are allegations reading:

> "The said letter of credit provided for shipment of caustic soda by defendant Colorado to plaintiff in Bombay, India, from a Gulf of Mexico port not later than September 22nd."

Paragraph 13 reads:

> "Said letter of credit provided for shipment of caustic soda by said defendant Colorado to (67) plaintiff in Bombay, India, from the Gulf of Mexico, U.S.A. not later than November 10, 1948."

Now, as your Honor heard in the opening this morning, the agreement alleged by the plaintiff, and the documents will establish it, had as a proviso that we were to furnish on board bills of lading evidencing shipment in one case on or before September 22nd, and the other on or before October 10th.

Now, frankly, I am surprised by this amendment. I don't know what he is driving at, and I think he ought to tell us whether or not he i claiming a different contract now than the one he alleged in his original complaint.

(68) Mr. Bensel: And I think we ought to be told whether or not he is claiming a different contract now than the one he alleged in his original complaint.

Mr. Dunn: If I may interrupt for a moment, your Honor, I think I can solve that by saying that I will eliminate that No. 2 request to amend. I don't consider it important. The purpose of it was because it was incorrectly stated there that the port was a Gulf of Mexico port. Actually, United States ports were provided for.

The Court: Do I understand, then, that you withdraw item No. 2 as set forth in your notice of motion to amend?

Mr. Dunn: Except that I would like to amend it to read "U. S. ports," instead of Gulf of Mexico ports to conform to the document.

The Court: Then you do not move to eliminate paragraphs 11 and 13 of the complaint in toto?

Mr. Dunn: That's right.

The Court: You simply move to amend such portions of those paragraphs 11 and 13 as refer to a Gulf port to read—

Mr. Dunn: U. S. ports.

The Court: —U. S. ports.

(69) Mr. Dunn: Yes, sir.

The Court: With that understanding, is there any objection from the defendants?

Mr. Bensel: May I just look at this? No.

Now, as to item 1, to change the date September 28 to September 1. Frankly, I don't know what theory is changing here. He has got a contract which he alleges provides for—

The Court: Irrespective of what he is alleging, do you object to the amendment as he now moves?

Mr. Bensel: I would be forced to plead surprise unless I know the theory or the purpose for it.

The Court: Are you pleading surprise with reference to any of these amendments on which you have had notice since December 30th? I would simply have to declare a mistrial.

Mr. Bensel: I don't want that.

The Court: Do you claim surprise with reference to any of these amendments?

Mr. Bensel: I would like to withhold that statement until I ascertain from counsel what the (70) purport of that amendment is in so far as his cause of action is concerned. I think I am entitled to know what his theory is so that I can adequately prepare for it.

The Court: All right. Do you want to make a statement?

Mr. Dunn: I am quite willing to make such an explanation.

There is no change whatever in the basic proofs or the basic facts in this case. There is no intention to add any new facts or to change the original facts on which the complaint was based. All we have is a question of a legal interpretation of the effect of this contract between the parties.

The purpose of the amendment is to preserve the plaintiffs' right to claim that the legal effect of the contract as made was that the defendant Colorado bound itself to make shipment not later than September 1st.

In the event that the Court finds otherwise, it may find that the contract was that a shipment might be deferred until September 22nd or October 10th. In other words, I claim that the contract as arrived at by cables and direct communications was (71) designed to create an obligation

to ship by September 1st, and to negotiate the documents not later than the times mentioned in the letters of credit.

However, we are concerned only with what the Court finds to be the shipping date. It is not too important. I don't think it surprises anybody because it has been argued. The facts constituting it have been in the case since they were ascertained by depositions and stipulations of documents.

Mr. Bensel: Your Honor, the statement of counsel has served its purpose. He stated he has no new or additional evidence other than what appears in the documents. That is what I wanted to know.

I don't claim surprise. I don't oppose it.

The Court: All right. How about the other amendments? Have you any objection to any of the amendments?

(No response.)

The Court: There being no objection, the amendments moved for by the plaintiff are granted.

Mr. Bensel: As far as amendments 4, 5, 6 and 7, which go to his theory of damages, I assume it (72) is not necessary for us to argue whether that theory is correct or not.

The Court: No, the rules provide that the plaintiff shall be awarded such damages as the facts and evidence in the law entitle him to receive, irrespective of the nature of his prayer.

Mr. Bensel: And I assume, further, in view of these amendments we are deemed to have been denied the allegation as amended?

The Court: Yes.

Have you any more motions to make?

Mr. Dunn: I have none.

The Court: Now, the defendants indicated that they have some motions to make.

Wait a minute, first Colorado.

Colloquy.

Mr. Bensel: Well, I would suggest that counsel for Isbrandtsen, since they were the ones who first noticed this amendment, might speak. We just took the same amendments they did.

Mr. Scott: As I understand it, the amendments which have been made to the complaint are deemed to be denied on behalf of all the defendants.

The Court: All defendants, yes, sir.

Have you any motion to make yourself?

(73) Mr. Scott: Yes, sir.

The Court: Let me hear it.

Mr. Scott: Defendant Isbrandtsen has served two notices of intention to amend, one dated December 30, 1954, and one dated January 4, 1955, to add paragraphs 47 to 53, inclusive, to the answer of this defendant. Those are the amendments I mentioned this morning in my opening statement. I request your Honor to allow those amendments.

The originals have been filed here, and I hand you copies, if you wish to have them (handing to Court).

The Court: Do I understand that this motion is joined in by the other defendants as well?

Mr. Scott: They have served similar notice, yes, sir, with one exception: Colorado served a notice on only one of those amendments because, it not being a carrier, one of the statutes—

Mr. Bensel: We pleaded, your Honor, in our proposed notice, which is on file here, the one-year Louisiana statute similar to—

The Court: Is there any objection by the Plaintiffs to these motions to move to amend the answers made by the respective defendants as set forth in their (74) notice of motion to amend?

Mr. Bensel: You mean by the plaintiffs?

Colloquy.

The Court: By the plaintiffs, yes. Has the plaintiff any objection?

Mr. Dunn: With respect to Isbrandtsen's notice adding paragraphs 49, 50, et sequitur, to their answer—I think that is the best way to identify it—the plaintiff has no objection. That is the notice dated January 4, 1950.

The Court: How about the other notice dated December 30th?

Mr. Dunn: With respect to the notice dated December 30th concerning the pleading in effect of two different law statutes of limitations, and the similar motion made by American-Hawaiian, and the partially similar motion made by Colorado, the plaintiff asks that if that amendment be granted, it should only be on certain conditions for this reason:

The notice to amend, of course, was for amendment at the trial and was served a number of years after the original answers. It attempts to set up now as an additional defense something that is not on the merits, and which in effect accuses the plaintiff of laches of a very short period, and overlooks a (75) similar laches on the part of the defendants extending over several years.

Now, I am quite aware, your Honor, and I don't want to make an issue of it, of the fact that the Court is disposed to grant such amendments, and that the late Judge Hulbert has stated that he is not going to penalize litigants for any misconception of the statute of limitations made by counsel.

However, we have gone through the proofs in this case during those intervening years. We have had testimony taken in New Orleans at the plaintiffs' expense. All counsel—

The Court: Are you pleading surprise? Do you oppose this amendment on the ground of surprise?

Colloquy.

Mr. Dunn: I ask for its being granted on condition. In other words, I am not opposing the Court's granting the amendment.

The Court: What condition do you ask be imposed?

Mr. Dunn: One condition is that if the defendants are going to bring in any expert to prove the law of Louisiana, that they should stand the expense of any similar expert that the plaintiff has to bring in. The reason for that is that—

(76) The Court: They are asking me to take judicial notice of the laws of the State of Louisiana. They say, or they said in the openihg, the opening by Isbrandtsen's counsel, that it is purely statutory and codified, and I don't see the need for any speed.

Mr. Dunn: If they do not intend to bring in the experts, there is no point to this condition I am asking for.

The Court: Do you intend to have any expert here? I am going to take judicial notice of it. What do I need an expert on the law of Louisiana for?

Mr. Scott: I anticipated we would do whatever your Honor wishes.

The Court: I don't need an expert on the law.

Mr. Scott: I didn't think you did, Judge, but I have consulted one in the event you do and will do whatever you wish.

The Court: I don't need any expert.

Mr. Dunn: Then that is irrelevant.

The Court: If I decide that we should have an expert, they will pay a reasonable fee for your (77) expert, period.

Mr. Scott: Of course I can't consent to that.

The Court: A reasonable fee, $150; $150 apiece.

Now, what else?

Mr. Dunn: The other condition is that this issue which has been injected into the case at the last moment may turn whether we get to full consideration of it on questions of

whether the pleadings are ex contractu, or ex delicto, or whether they are in various other forms with which this Court, in this day and age, is not generally concerned.

In the event that the basic facts, the pleading of the basic facts should be changed in some respect to meet this statute as a result of its now being brought into the case, the plaintiff, I suggest, should have an opportunity, later on, to do that upon reasonable application.

The Court: The rules provide that pleadings shall be deemed amended to conform with the proof produced on the trial.

Mr. Dunn: Yes.

(78) The Court: Now to determine the nature of the action I apply federal law.

To determine what statute or what period of prescription or limitation applies to an action the nature of which I determine that this action is by the application of federal law, I apply the state law.

Do you understand the distinction that I have made?

Mr. Dunn: I do, your Honor.

The Court: All right. Any other conditions that you have, sir?

Mr. Dunn: With respect to that, I take it that if any amendment becomes necessary—

The Court: If any amendment becomes necessary, it will be deemed to have been made in compliance with the rules, that the pleadings will be deemed to have been amended to conform to the proof.

Mr. Dunn: Yes, sir.

The Court: Are there any other conditions?

Mr. Dunn: None.

The Court: Does the plaintiff claim surprise?

Mr. Dunn: We don't want any adjournment.

(79) The Court: Does the plaintiff claim surprise?

Mr. Dunn: No, sir.

Colloquy.

The Court: Then the amendments are granted as moved for by the various defendants.

Any more motions?

(No response.)

The Court: Let me ask one or two questions:

Is there any dispute here about the truth of the allegation contained in the first paragraph of the complaint, the jurisdiction allegation?

Will it be conceded that those are admitted and that this court has jurisdiction?

How about you gentlemen? Do the defendants concede that the court has jurisdiction of the subject matter and the persons of the defendants?

Mr. Tillinghast: I see no reason to object to it.

The Court: Do you concede it?

Mr. Tillinghast: Yes.

The Court: All defendants concede it.

Now, No. 2: With respect to the contract that the plaintiffs claim they had with Colorado, is there any dispute between the plaintiffs and (80) Colorado that if the Court is to determine whether or not a contract was in fact made, the Court is to apply the law of the State of New York.

Mr. Dunn: The plaintiff agrees.

Mr. Bensel: Pardon me, your Honor; I didn't get that. I was looking at this pleading.

The Court: To determine whether or not any contract was in fact made by the plaintiffs and the defendant Colorado I am to apply the law of the State of New York.

Mr. Bensel: Do you want to hear from the plaintiffs or the defendant?

The Court: I have heard from the plaintiffs. He says yes.

Mr. Bensel: The answer is yes for the defendant Colorado.

The Court: All right. And that if I find that any contract was made between the plaintiffs and the defendant Colorado, it is conceded by both sides that such contract was made in the State of New York and the construction of that contract is to be determined by the laws of the State of New York?

Mr. Dunn: I so concede with respect to the construction of the contract, your Honor.

(81) The Court: And the place of the contract: If I find that a contract was made and that it was made in New York, therefore it is to be construed according to the law?

Mr. Dunn: Yes, we concede that.

The Court: The plaintiffs concede that?

Mr. Dunn: Yes.

The Court: How about the defendant Colorado?

Mr. Bensel: We concede that.

The Court: All right.

Now let me hear the proof.

* * * * * * * *

(82) Mr. Dunn: I offer in evidence a stipulation of facts and documents which names documents annexed to it, documents designated as Schedules A through BI and ask—

The Court: This stipulation, as I see it, is only signed on behalf of the defendant Colorado.

(83) Mr. Dunn: That is true.

The Court: Do the other defendants want to sign it now?

Mr. Tillinghast: The defendant American-Hawaiian has no knowledge or interest in the exhibits attached to that stipulation, Judge Ryan. Those pertain to the sale and we knew nothing of it and I don't see how we could admit or be bound by it.

The Court: I am not asking you to be bound by them. I simply want to know whether you will concede the genuineness of these documents, reserving your right to object only to their relevancy or materiality with respect to your client.

Mr. Tillinghast: Yes, we can do that.

The Court: You do that?

Mr. Tillinghast: Yes.

The Court: How about you on behalf of Isbrandtsen?

Mr. Scott: I can do the same thing, your Honor, and the bills of lading are in there. I might say that we have already admitted those.

* * * * * * * *

(174) Cyril F. Powers, called as a witness by plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Dunn:

Q. Mr. Powers, are you employed by Isbrandtsen Company, Inc.? A. Yes.

Q. What is your assignment there? A. Chief adjuster.

* * * * * * * *

(177) Cross Examination by Mr. Scott:

Q. I refer now to the booking agreement, a (178) copy of which is included as an exhibit to the New Orleans depositions, which have already been offered in evidence, and direct the witness' attention to this copy of that agreement and ask the witness whether the SS Hawaiian was substituted?

Cyril F. Powers—For Plaintiffs—Cross.

The Court: Is that in the agreement between Colorado and Isbrandtsen providing for the transport of the cargo?

Mr. Scott: Colorado and the agents of Isbrandtsen at New Orleans who handled the matter.

By Mr. Scott:

Q. I ask you whether the Hawaiian was substituted for the vessel named in that agreement pursuant to the provisions for substitution in that agreement? A. Yes, sir.

Q. Was that substitution made on or about August 17, 1948? A. Yes, sir.

. . . . . .

(181) Q. Did you prepare from the records of Isbrandtsen the paper which I now show you (handing to witness)? A. Yes, sir.

Q. What does that show? A. That shows the actual itinerary of the vessel.

Mr. Scott: I offer it in evidence.

Mr. Bensel: Is that the Hawaiian?

Mr. Scott: Yes, sir.

Mr. Dunn: I do not object to the document going in your Honor, but I wish to point out that at least in one instance I see it is not exactly correct as to a date. This same information has been put in the record by the masters of the vessels by referring to the log and I don't think it is material. That is August 30, 1948, for arrival at New Orleans. The date was actually the 31st.

The Court: I don't know whether the log (182) covers the period of the entire voyage or whether it doesn't. If the log does cover it, this exhibit is unnecessary, although it might be of aid

to the Court in locating the dates if an examination of the log is necessary. But the construction of this exhibit or the offering of this exhibit by the defendant raises a point that perhaps I should have cleared up by the plaintiffs.

Mr. Scott: May I mark it for identification?

The Court: Wait, please.

Is it the contention of the plaintiffs that Isbrandtsen failed to prosecute the voyage upon which this cargo was carried promptly and without deviation or do you claim that there was delay in the voyage, unreasonable delay in the voyage, and that there was deviation?

Mr. Dunn: With respect to deviation, I take it your Honor is using the term with regard to calling at ports without a legal right to do so under the circumstances rather than a deviation of the issuance of the bill of lading.

The Court: I refer to the voyage as being the journey of the ship from the time it broke port in the Gulf and when it landed in Bombay. I don't (183) refer to that period of time which transpired between the date on which the loading of the cargo was completed and when it broke port, but from the time the ship left port on its voyage to India until its arrival at the port at Bombay, does the plaintiff claim that the voyage was not prosecuted promptly and with due diligence and without deviation?

Mr. Dunn: We do with respect to its departure from New Orleans and with respect to its calling at Tampa.

The Court: Perhaps I didn't make my inquiry specific or make myself pl[illegible].

Colloquy.

From the time the ship left the Port of New Orleans to the time it arrived in Bombay, does the plaintiff claim that portion of the voyage was not prosecuted diligently, promptly and without deviation?

Mr. Dunn: Putting it from the time it left New Orleans, we only have the Tampa stop to complain about, which would cause a delay not material to this action if the same latitude is extended at the other end of the voyage in figuring damages or a date for damages.

The Court: I think this is very important. I would like to get a statement of the plaintiffs' (184) position on this because we have about reached the close of the plaintiffs' case, as I understand it.

Do I understand, then, from your statement that there is no claim made on behalf of the plaintiffs that the voyage of the vessel, once it left the Port of New Orleans, was not promptly and diligently prosecuted and was prosecuted without deviation until you landed in Bombay? Do you waive any complaint with reference—

Mr. Dunn: I put it this way, your Honor: I do not attribute our damage to any delay and in order not to keep it in the case as a small and fairly immaterial matter, I will withdraw such claim with respect to the voyage.

The Court: So that there will be no misunderstanding, then, it is not claimed by the plaintiff that it sustained any damage by reason of a failure to diligently prosecute the voyage from the time that the ship left New Orleans to when it arrived in Bombay?

Mr. Dunn: To make it very clear, in determining a date when the vessel should have arrived, and when

it did arrive, one cannot pinpoint it as a matter of minutes or even as a matter of a day or (185) two. Consequently, anything involved in the voyage about which we might complain would be under the category of de minimus and we can't expect to pinpoint our time to that extent. For that reason I am withdrawing any such claim.

The Court: All right.

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(213) FREDERICK R. BECKER, JR., called as a witness in behalf of Colorado Fuel and Iron Corporation, having been first duly sworn, testified as follows:

Direct Examination by Mr. Bensel:

* * * * * * * * *

(214) Q. How long have you been connected with the Farrell Shipping Company? A. Since November, 1932.

Q. Does the Farrell Shipping Company act as freight forwarders for various customers throughout the United States? A. That is correct; that is the nature of our business.

Q. And one of your customers is Colorado Fuel and Iron? A. Yes.

Q. Who are some of the other large customers of your company? A. Caltex Oil Products Company, Texas Company, Procter & Gamble, Firestone Tire & Rubber Company, Mid-Continent Petroleum Corporation, Standard Vacuum Oil Company.

Q. With all due pride, would you say that Farrell Shipping Company is one of the largest local freight for-

warders and brokers in the Port of New Orleans? A. Definitely.

* * * * * * * *

(217) Q. With whom did you make the arrangements for space for this merchandise? A. Well, we were finally successful in getting space from Isbrandtsen Steamship Company through their agents, Hansen & Tidemann.

Q. In New Orleans? A. Yes.

Q. And did you, on behalf of Colorado, enter into a freight engagement contract? A. We did.

Mr. Bensel: Your Honor, that has been offered in evidence and I am not going to take any time with that.

Q. That was on July 29th, wasn't it? A. I think that's correct.

Q. Did that contract specify the boat? A. Yes, it named the SS Jane G. Swisshelm or equal A-1 substitute, as I recall.

Mr. Tillinghast: Will you fix the date of the contract, please?

Mr. Bensel: July 29. It has been marked in evidence.

* * * * * * * *

(218) Q. Did there come a time when Hansen & Tidemann advised you that Isbrandtsen desired to substitute a vessel for the Swisshelm? A. Yes.

Q. Do you remember when that was, approximately? A. No. It was either at the time of the first booking or shortly thereafter.

Frederick R. Becker, Jr.—For Colorado Fuel and Iron Corp.—Direct.

Q. Did they tell you the name of the vessel that they were going to substitute? A. Not at that time. It was not known. Later they did.

Q. Well, did there come a time in August, 1948, when they advised you of the name of the vessel to be substituted? A. Yes.

Q. What was it? A. The SS Hawaiian.

* * * * * * * * *

(219) Q. Under this freight engagement contract that you mentioned a minute ago, Isbrandtsen reserved the right to substitute what is known as an A-1 vessel. (220) What does the term "A-1" mean?

The Court: The Court will take judicial notice of that. It is a Lloyd's classification, isn't it?

The Witness: Yes, sir.

Q. For insurance purposes? A. For insurance purposes, correct.

* * * * * * * * *

(222) Q. Did the merchandise arrive in New Orleans from Colorado? A. Yes, it arrived on the west side, at a little town called Westwego.

Q. On what railroad? A. Texas and Pacific Railroad.

Q. Were you advised that all of the caustic soda that had been shipped by rail from Colorado to Westwego had been loaded aboard the S.S. Hawaiian? A. Yes, we were advised of that loading.

Q. And all of it was loaded? A. All of it was loaded.

Q. There was none left on the dock or wharf? A. Definitely not.

* * * * * * * * *

(223) Q. Did there come a time when Hansen & Tidemann requested you to pay this freight? A. Yes, they

told us we would have to pay the freight to secure the ocean bills of lading as soon as the cargo was loaded.

Q. Did you communicate that fact to Colorado? A. We asked Colorado to give us a check payable to Hansen & Tidemann for the amount so that we would have it available to secure the bills of lading as soon as the cargo was loaded.

Q. And did you get a check from Colorado? A. We did.

Q. Do you remember when? A. It was received in our office on September 2nd.

Q. And did you turn that check over to Hansen & Tidemann? A. We turned that check over to Hansen & Tidemann, as I recall it, on September 3rd, at which time they surrendered the bills of lading (224) to us.

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(245) Cross Examination by Mr. Scott:

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Q. Do you keep abreast of day to day events there? A. I try to.

Q. When did you learn of this strike, what (246) time of the day? You said September 3rd. A. I do not recall the exact hour of the day.

Q. Well, your best recollection. We are not trying to—

The Court: He wants your best recollection.

A. I would say in the afternoon, I believe.

Q. Can you come any closer to about what time it was? A. Perhaps very early in the afternoon.

Q. By that time, before that time, the bills of lading covering this caustic soda had been issued and were in your possession? A. I believe so.

Q. And the freight had been paid? A. I think so.

Q. You had your messenger pick those bills of lading up at the office of Hansen & Tidemann about 9 o'clock in the morning of the 3rd, didn't you? A. Well, I wouldn't—

Q. Of September 3rd? A. I think it was in the morning but I wouldn't recall the time.

* * * * * * * *

(247) Q. Who picked the bills of lading up? A. Probably one of our runners.

Q. Isn't that the fact?

Mr. Bensel: Isn't what the fact?

The Court: Isn't it the fact that it was one of your runners?

The Witness: Yes.

* * * * * * * *

(248) Q. Did you ask for the bills of lading? A. It is customary for us to do so and it is difficult to remember so far back.

Q. I understand; I am just trying to get your best recollection. A. In the normal procedure of our business we would ask for the ladings, yes, sir.

Q. You as the shipper? A. As the shipper's representative.

(249) The Court: Do you recall whether on this particular ship you asked that the bills of lading be sent to you or that you sent someone to pick them up?

The Witness: We must have asked for it. It is a customary procedure to do so. Bear in mind I didn't personally handle every detail of the transaction. The clerks in the office perform certain duties in following the shipments up, getting them

delivered and tracing it to see that we get our documents as soon as possible and we must have asked for them.

* * * * * * * *

(250) Q. This booking arrangement for 1000 tons which you made under date of July 29th was amended and extended to include additional tonnage? A. Yes, sir.

Q. At a later date? A. Right.

Q. Was that extension made after the substitution of the Hawaiian for the Swisshelm? A. Yes.

Q. So that at the time the extension was made you had knowledge of the substitution? A. What do you mean by extension? Do you mean the increase to 1500 tons?

Q. Yes, the increase. A. Yes, that's right. As I recall it, the increase was made about two days after advice of the substitution of the SS Hawaiian.

Q. That substitution was entirely satisfactory to you, was it? A. Yes.

Q. You didn't care which vessel it was so long (251) as it was an A-1 vessel? A. That is correct. As I see it, we had no choice. The contract specifies an A-1 vessel.

Q. It made no difference to you, is that right, the substitution of a vessel? A. No, it would have made no difference to me.

* * * * * * * *

(252) Q. Do you know when the loading of this was completed on September 3rd, what time of the day, or before what time that day? A. I think if I search my files I could check it, but, as I recall, it was in the wee hours of the morning, I think.

Q. Will you see whether you have definite information on it, if it won't take too much time? A. Well, I would have to go through this here.

Frederick R. Becker, Jr.—For Colorado Fuel and Iron Corp.—Cross.

(Witness examines papers.)

A. (Continuing) I would say that all the caustic was loaded by 7:00 a.m. September 3rd.

Mr. Dunn: I could not hear that.

The Court: He says that he would say that all of the caustic soda was loaded by 7:00 a.m. on September 3rd.

Q. And that 7:00 a.m. hour is the time the (253) night shift knocks off at New Orleans, isn't it, 7:00 a.m.? A. Yes, that's right.

Q. Would you say that you received the bills of lading after 7:00 a.m. on the 3rd? A. Oh, yes, definitely. Our office doesn't open until at least 8:30 or 9:00 a.m.

Q. Would you say that you received the bills of lading before noon on the 3rd? A. That is very difficult to make a definite statement on. I would say we definitely had them on September 3rd. It is difficult to pin it down to a time. We are picking up hundreds of bills of lading daily and to remember one specific transaction is very difficult.

* * * * * * * *

(260) Q. You have no reason to believe that any information was withheld from you? A. No.

Q. You were satisfied that you had all available information which concerned you about this matter?

Mr. Bensel: What matter?

Mr. Scott: About this cargo, the shipment.

A. I don't quite understand your question.

Q. You received all the information you wanted as things went along, didn't you? A. Yes, whenever we asked questions the answers were there for us.

Matthew S. Crinkley—For Defendant Isbrandtsen Company, Inc.—Direct.

Q. There were no strained relations of any kind? A. Definitely not.

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(317) MATTHEW S. CRINKLEY, called as a witness by defendant Isbrandtsen Company, Inc., being first duly sworn, testified as follows:

Direct Examination by Mr. Scott:

Q. By whom are you employed, Mr. Crinkley? A. By the Isbrandtsen Company, Inc., of New York.

Q. What is your position? A. My position is executive vice president.

Q. How long have you held that position? A. Two years. Before that I was vice president since about 1936 or 1937.

Q. How long have you been with the company? A. Twenty-five years in July.

Q. Did this matter in suit here, as far as (318) Isbrandtsen was concerned, come under your overall supervision? A. Yes, sir.

Q. You are familiar in general with the booking under which this caustic soda was booked? A. Yes, sir.

Q. And the substitution of the SS Hawaiian for the Swisshelm? A. Yes, sir.

Q. Who were your agents at New Orleans? A. At that time it was Hansen & Tidemann, Inc.

Q. When did you first hear of this strike at New Orleans? A. I only heard about it late in the day on September 3rd. I was told that a strike had been called and loading discontinued and the vessel put at anchor.

Q. September 3, 1948? A. 1948, yes, sir.

Matthew S. Crinkley—For Defendant Isbrandtsen Company, Inc.—Direct.

Q. And after that the vessel was off hire— A. Yes, sir.
Q. —as between Isbrandtsen as charter and the Hawaiian Line as owner? A. Yes, sir, American-Hawaiian Company.

(318a) Q. Until the strike was over and the vessel sailed? A. Yes, sir, until the strike was over and the vessel returned to the pier to complete loading.

Q. Then it came back on hire? A. Yes.

(319) Q. I show you a cable and ask you whether you have produced that from the company's files. A. Yes, sir.

Mr. Scott: Mark it for identification, please.

(Marked Defendant Isbrandtsen's Exhibit E for identification.)

Mr. Scott: I offer that in evidence.
The Court: Is there any objection?
Mr. Dunn: No objection.

(Defendant Isbrandtsen's Exhibit E for identification received in evidence.)

Q. Mr. Crinkley, that cable is the sailing orders for the master of the vessel? A. Yes, sir, to leave New Orleans.
Q. I show you another cable and ask you whether you have produced that from your files? A. Yes, sir.

Mr. Scott: Mark it for identification, please.

(Marked Defendant Isbrandtsen's Exhibit F for identification.)

Mr. Scott: I offer that in evidence.

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Direct.

The Court: I do not see the relevancy (320) of the cable in view of the concession made by the plaintiff. The plaintiff does not claim that once the ship sets sail from the port that there was any deviation or delay in the voyage.

Let me see it.

(Exhibit is handed to the Court.)

The Court: I do not see how this is material at all in view of the concession that plaintiff has made here.

Mr. Scott: Very well, your Honor.

The Court: If you think it is you put it in the record. You have a concession here by the plaintiff that the plaintiff does not claim that the voyage was not conducted properly or that there was any deviation after the ship left the Port of New Orleans.

Do I understand the plaintiffs' concession correctly?

Mr. Dunn: We are not claiming deviation after the vessel left New Orleans.

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(349) SIGUARD E. SIMPSON, JR., called as a witness by defendant Isbrandtsen Company, Inc., being first duly sworn, testified as follows:

Direct Examination by Mr. Scott:

Q. Mr. Simpson, by whom were you employed in September, 1948? A. Hansen & Tidemann, Inc.

Q. Of where? A. New Orleans, Louisiana.

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Direct.

Q. What was the relationship between Hansen & Tidemann and Isbrandtsen at that time with respect to this vessel, the SS Hawaiian? A. Hansen & Tidemann, Inc. in New Orleans were agents for Isbrandtsen Company, Inc.

Q. Did you personally handle a large number of matters which related to the vessel and this cargo? A. Yes, I did.

Q. When did you first see this vessel? A. On the arrival at the bunker terminal on the—I think it is 10 o'clock on August 30th, if I am correct, on arrival at the bunker terminal at Chalmette, Louisiana.

Q. Did you board the ship at that time? A. Yes, I did.

Q. What's the procedure when a ship comes in to the Port of New Orleans as this one did? (350) A. Well, the preliminary customs entry must be made before any business can be taken care of. On boarding the vessel the United States Custom inspector boarded with us and did the preliminary entering of the vessel at that time.

Shall I go on? I can go on right down to the time we commenced bunkering and from there on out, because there was a lot of business transacted at that time.

Q. Did you look at the condition of the vessel? A. Yes, sir.

Q. What was the condition of the vessel? A. Good condition.

Q. Did you keep continuous contact with the loading of this vessel while it was there and while it was loading? A. Yes, sir.

Q. When were the two bills of lading covering this caustic soda shipment delivered by Hansen & Tidemann to Farrell Shipping Company? A. They were not delivered. They were delivered by Hansen & Tidemann, Inc. to the runner of Farrell Shipping Company in our office on the morning of the 3rd.

(351) Q. At what time? A. At 9:30.

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Direct.

Q. 9:30 o'clock in the morning of September 3, 1948? A. That's right.

The Court: May I interrupt? Have we this witness' deposition in evidence?

Mr. Scott: No, sir, we have not.

By Mr. Scott:

Q. Had any request been made by Farrell Shipping Company for those bills of lading before that time? A. Yes. It is a normal procedure to be called and asked when they could possibly—when they may expect to be able to receive their ladings. They called the day prior, the 2nd.

Q. Who, for Farrell, made that request? A. Well, it would be any number of persons in their office. I don't think it was Mr. Becker himself. I would say one of the clerks under his jurisdiction in the office would call to find out when his bills of lading would be ready.

Q. At the time those bills of lading were issued, was this cargo on board the SS Hawaiian? A. Yes, it was.

(352) Q. At the time those bills of lading were delivered by Hansen & Tidemann to Farrell, did you know anything about this strike? A. In which respect?

Q. Had the strike occurred? A. No, it had not.

Q. When did it occur? A. To my knowledge, at 10 o'clock on the morning of the 3rd of September.

Q. When did you first learn about it? A. At 10 o'clock.

Q. At the time the bills of lading were delivered by Hansen & Tidemann to Farrell, did you know there was going to be a strike? A. No, I did not.

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Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Direct.

By the Court:

Q. Were you down at the dock while the ship was (353) being loaded and cargo stowed? A. No, sir, not during the whole operation. I was down there on numerous occasions, yes, sir.

Q. Were you down there when it began? A. Yes, sir, the first morning of loading I am always down there.

Q. When did it begin? A. Is that on the 31st? Did she commence loading on the 31st according to the port log there?

Q. Don't you know without looking at a record? A. Yes. I would say on the 31st at 1:00 o'clock.

Q. A. M. or P. M.? A. P. M. I think the port log will bear that out.

Q. Where was this cargo stowed? A. The caustic soda?

Q. Yes. A. No, sir, I couldn't tell you without looking at the plan of the vessel.

The Court: All right.

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(355) By Mr. Scott:

Q. In whose custody was the SS Hawaiian while (356) it was off hire? A. Strachan Shipping Company in New Orleans.

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By Mr. Scott:

Q. After the strike was over, was this vessel (357) loaded and dispatched from New Orleans as fast as possible? A. Yes, sir, she was. She worked completely around the clock from the commencement of loading until she sailed.

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Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Cross.

Cross Examination by Mr. Tillinghast:

(363) Q. I hand you what are demoninated Plaintiffs' Exhibit Dalton 1, supplied by Mr. Dalton at the time of his examination. These are captioned "Mate's Daily Report." You are familiar with those records? A. Yes, sir.

Q. Do you keep those records? A. Yes, sir, our chief wharf clerk keeps those.

Q. And they are prepared in the ordinary course of your business? A. That's right, sir, each day.

Q. Each day. I show you page No. 1. Does that show all the cargo loaded on August 31? A. Yes, sir, it does.

Q. Between what hours? A. No, it doesn't say between which hours on here.

Q. Would it be before midnight on that day? A. You say, would it be all loaded—

Q. Before midnight. A. On August 31?

Q. Yes. A. Yes, since it don't—

(364) Q. August 31st ends at midnight, doesn't it? A. Yes, it does.

Q. I show you page 2. What does that show with respect to the loading of the cargo? A. It shows the cargo loaded on September 1st with a second sheet to follow.

Q. Is this on September 1st? A. This is all cargo loaded on September 1st, yes.

The Court: These are the tally sheets, are they not?

The Witness: The mate's daily reports of what goes into the ship.

The Court: Of what goes into the holds?

The Witness: Yes, sir.

Q. That is to midnight on the 1st of September? A. Yes, sir.

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Cross.

Q. Now I am showing you the next page captioned September 2.

Mr. Bensel: There are two sheets, aren't there?
Mr. Tillinghast: There are three sheets.

Q. What does that sheet demonstrate? A. It shows the cargo loaded on September 2nd.

(365) Q. Up to what time, do you know? A. No, sir. We could say midnight but I don't know.

Q. What dates do those sheets cover? A. September 2nd and to 7:00 a. m. on September 3rd.

Q. When are those records made, Mr. Simpson? A. At the time of loading.

Q. As drums were taken from a particular railroad car and loaded into the ship there was a note made on this mate's report? A. As it was taken off of the wharf. These drums had already been placed on the wharf and identified by car numbers, and when all of that car was removed from the wharf then that was placed on this daily mate's report, signed for by the mate.

Q. By that you mean when it was taken from the particular railroad car and loaded into the ship? A. Taken off of the wharf because from the railroad car it is unloaded and put on to the wharf.

Q. Yes. A. And then when it is removed and taken off of the cars—taken off of the wharf and loaded into the ship, and an entire car has been removed off of the wharf, it is placed on this hatch (366) report by the mate.

Q. And the car numbers are noted on these records? A. On this report, that's right.

Q. You list cargo loaded from the wharf, removed from the wharf, as you said, as it is loaded? A. That's right.

Q. Each shipment in its turn depending on when it is loaded is listed? A. That's right.

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Cross.

Q. Did you order stevedores to work overtime on September 2d? A. Yes, sir, they were ordered to work around the clock. We had decided because of the overtime, to get the ship out, to sail the ship before the weekend would cost a lot less than what the ship was actually costing us.

Q. What time was the loading of the ship completed? A. What time?

Q. At what time was the loading of the ship stopped? A. Oh, stopped. At 10 o'clock on September 3rd.

Q. And there was no loading from what time forward? A. From 10 o'clock forward.

Q. Will you refer to the mate's records, the mate's daily reports, and refresh your recollection (367) and see if that is still your answer, on September 2d? A. Yes, they worked from 7 o'clock until 10 o'clock on the 3rd, on September 3rd—they worked up until 10:00 a. m.

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(368) Q. According to the stowage plan where was the caustic soda stowed which is the subject of these two shipments?

The Court: Objection sustained.

Q. Now that—

The Court: The stowage plan speaks for itself and will be examined by the Court.

Next question.

Q. Isn't it a fact that all the caustic soda (369) was stowed in the lower holds—

The Court: Objection sustained.

Counsel, I dont think you understand my ruling; if you do, you do not want to abide by it.

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Cross.

Mr. Tillinghast: I have a very good point in this, your Honor.

The Court: Then on your statement and my recognition of your ability as an experienced trial counsel I will permit the question to be answered, although I think it is a point that you might make in your brief. All right you may press it, if you want.

Mr. Tillinghast: It is obvious from these documents, and I think Mr. Simpson will bear it out, that this caustic soda was not only heavy cargo but that it required bottom stowage, and it was also consigned to the final ports of call on this voyage; that other cargo stowed in the same holds would necessarily have to be on top of this cargo and would be loaded after the caustic soda was loaded.

Is that true, Mr. Simpson?

A. That's right.

Q. What other cargo on September 2nd particularly with respect to the caustic soda was (370) loaded? A. Only trucks and vehicles.

Q. And auto parts also? A. That is right.

Q. Where were those auto parts, automobiles and vehicles loaded? A. I have some here in the No. 1 lower—

Q. What ports were they consigned to? A. Khorandran and Bashra.

Q. On this vessel's itinerary, when she sailed from New Orleans, which came first, Bombay or the last two ports that you just mentioned? A. The last two ports came first.

Q. Was the Bashra and Khorandran cargo stowed over the caustic soda? A. Yes. The stowage plan shows that automobiles were put on the caustic soda in four lower

holds and also in No. 5 lower hold; as a matter of fact, throughout the whole ship.

Q. Could you express an opinion as to how long it took you working every hold and every hatch to load the Khorandran and Bashra cargo? A. They were not loading every hatch with the Bashra and Khorandran cargo on the 2nd of September; they were only loading No. 1, 2, 4 and 5, and only partially No. 1 and 2 which would take—which would (371) make—I am sorry, I am looking at the caustic soda. They only loaded in No. 1 and 4 holds—I am sorry, I have got the wrong sheets in front of me.

On September 2nd and 3rd during the night of September 2nd and 3rd, the automobiles were loaded in No. 1, No. 2 holds, No. 5 and No. 4.

Q. The caustic soda had been loaded in those holds, hadn't it? A. Yes, prior to the time.

Q. Isn't it also a fact that you did not complete the loading of the motor vehicles until after the strike when the vessel put back into the berth? A. That's right, we had to go back to Westwego to complete the loading of the vehicles at Westwego.

Q. Would that indicate to you that the loading of the vehicles followed the loading of the caustic soda? A. Yes, sir.

Mr. Tillinghast: I have no other questions.

Re-direct Examination by Mr. Scott:

Q. Mr. Simpson, do you have your loading certificate there when the loading was completed? A. The New York Board of Underwriters loading certificate?

(372) Q. Yes. A. Yes.

Q. That is the original? A. Yes.

Q. Is that complete now? A. That is the underdeck cargo. This is for the deck loading.

Mr. Scott: Mark these for identification, please.

(Marked Defendant Isbrandtsen Exhibits I and J for identification.)

Q. Does Exhibit I relate to the underdeck cargo? A. Yes, sir.

Q. Does that include the caustic soda? A. Yes, sir.

Q. All of it? A. Auto parts, soda ash, lube oil and miscellaneous general cargo.

Mr. Scott: I offer that in evidence.

Mr. Dunn: I move to strike out the witness' last answer. If this paper is going to be offered in evidence I think it should be permitted to speak for itself.

The Court: I am not going to take this witness' interpretation of what is shown on a document. I will look at the document myself. Is there any objection?

(No response.)

(373) (Defendant Isbrandtsen Exhibit I for identification received in evidence.)

Q. Does this other certificate relate to the deck cargo, the one that has been marked J? A. Yes, it does.

Mr. Scott: I offer this in evidence.

(Defendant Isbrandtsen Exhibit J for identification received in evidence.)

Siguard E. Simpson, Jr.—For Defendant Isbrandtsen Company, Inc.—Re-cross.

Q. Are those all the loading certificates issued for this vessel? A. Yes, sir.

* * * * * * * *

(395) Re-cross Examination Continued by Mr. Tillinghast:

Q. After the labor dispute was settled and the labor impediments were removed in December 1948, were operations resumed on the ship? A. Yes, sir.

Q. Was there any delay in resuming operations? A. Not any abnormal delay, if any.

Q. What do you mean by that? A. Well, I mean anything that would hold the ship up outside of her normal operations.

Q. It took a considerable time to get a crew, didn't it? A. I think two or three days.

(396) Q. And after the crew was on board it took time to get up steam and get the ship in condition to load? A. That's right.

Q. One more point: is there any doubt in your mind that the caustic soda was loaded before the bills of lading were issued? A. Is there any doubt?

Q. Yes. A. No, sir.

Q. None whatever? A. None whatsoever.

The Court: All right, thank you. Next witness.

* * * * * * * *

(486) Mr. Scott: On behalf of defendant Isbrandtsen (487) Company, Inc., at this time I renew this defendant's motion to dismiss made at the end of the plaintiffs' case, and further move to dismiss the second, third, fourth and fifth causes of action on the ground that the plaintiff has failed to make out a case or failed to present evidence entitling it to judgment.

The Court: I will reserve decision.

Mr. Scott: I further and specifically move to dismiss the fifth cause of action on the ground that that cause of action for cargo damage is barred by the one-year provision in the United States Carriage of Goods by Sea Act applicable to this shipment and incorporated in the bills of lading, the cargo having been delivered in India on or before March 12, 1949, and the action not having been commenced against Isbrandtsen until the service of the summons and complaint on this defendant on or about October 27, 1950, more than one year after the delivery of the cargo.

The Court: I am tempted to grant your motion, but at this time I will reserve decision.

Mr. Dunn: May I ask the Court to request counsel to clarify as to whether he is arguing with (488) respect to the statute which has to do with the Carriage of Goods by Sea Act, or the bill of lading.

The Court: He is arguing both. He is arguing both on the statute, insofar as it is incorporated by the bill of lading and by express reference to it; he is also arguing by reason of the Louisiana statute that he has urged, and on all the grounds he has urged both on the trial and in the memorandum that he has submitted.

Mr. Scott: I am coming to the Louisiana statute now.

The Court: You do not have to come to it. You move to dismiss on all grounds and I am going to reserve decision on it.

Mr. Dunn: Does his pleading as to the statute still stand? That is all I want to know, your Honor.

The Court: I understand that he has pleaded the Louisiana statute as one of the defenses.

Mr. Scott: There are two Louisiana statutes, one of which is applicable to a common carrier—

The Court: Yes, I understand.

Mr. Scott: They are pleaded in the amended (489) answer which amendment your Honor granted on the trial, and I will now hand up to your Honor, as you requested the other day, a photostatic copy—

The Court: Of the statute?

Mr. Scott: Of those statutes.

The Court: I am very grateful to you for that. Are they in English or French?

Mr. Scott: They are in English, sir. Those statutes relate to prescriptions. One of them is a 2-year statute applicable to common carriers and runs from the date of shipment, the date of shipment here being the date the goods were placed on the vessel and bills of lading issued, namely, September 3, 1948. The action was not commenced until October 27, 1950, more than two years after that date.

It is interesting to note that in the annotations to the Louisiana statute they fix the date of shipment as the date the goods are delivered to the carrier for shipment and on which the carrier issues its bill of lading, and in the annotation they cite the case of Goldenberg v. Cutler, 189 App. Div., 489, 178 N. Y. Supp. 522.

The Court: That is New York law.

(490) Mr. Dunn: I realize that, but isn't this something for briefs?

The Court: Yes, it is, but Mr. Scott wants to inform the Court on this. I think that he has already pointed it out in a memorandum that he submitted and that I have had occasion to read some weeks ago.

Mr. Scott: Now, the other Louisiana statute which was handed up is in Article 3536 of the Louisiana Civil Code and that applies to all others; that is a 1-year statute and it applies to tort actions generally, and the prescription runs as to offenses or quasi offenses and includes everything not previously provided for. I have included

in the pages I have handed up the preceding sections which relate to a shorter period to which I refer now and my motion to dismiss is on the ground of each of those Louisiana statutes, and also I contend that the 1-year statute in the United States Carriage of Goods by Sea Act applies as well to the second, third and fourth causes of action.

I have previously mentioned that as to the fifth, and I think it applies to the others as well. (491) It is covered by the bill of lading which incorporates that statute and which is applicable as a matter of law to this shipment. So I make my motion to dismiss broad enough to include all those grounds.

On all the proof and on the answer of the defendant Isbrandtsen Company, Inc., as amended I move for a judgment.

The Court: Decision is reserved.

Mr. Scott: There is one other motion I have, and that is: I move to dismiss the cross claim of American-Hawaiian Steamship Company against Isbrandtsen Company, Inc., which cross claim is included in paragraphs 39, 40, 41 and 42 of the answer served by the defendant American-Hawaiian Steamship Company.

The Court: Decision is reserved.

* * * * * * * *

Plaintiffs' Exhibit 2 (In Part).

(Badhwar Deposition)

(1254)

Deposition of R. S. Dass Badhwar, one of the plaintiffs herein, taken by the plaintiffs at the offices of Messrs. Rathbone, Perry, Kelley & Drye, attorneys for defendant, the Colorado Fuel and Iron Corporation, No. 70 Broadway, New York, N. Y., commencing at 2:30 o'clock P. M. on the 30th day of November, 1950, before Irwin R. Stone, a Notary Public of the State of New York.

* * * * * * * *

(1256) R. S. Dass Badhwar, called and sworn as a witness on behalf of plaintiffs, testified as follows:

* * * * * * * *

(1275) Cross Examination by Mr. Bensel:

Q. Mr. Badhwar, what is your business? A. I am general manager of sugar mills, general manager of R. B. Lachhmandass Mohanlal & Sons, Ltd., (1276) sugar mills, Jarwal Road, O. T. Rly., India, and a partner of Mulkraj Brothers & Badhwar.

Q. And were you general manager and partner of that firm in August of 1948? A. Yes.

Q. And you still are? A. In August, 1948 I was not general manager.

Q. What were you? A. I was only a partner and consultant to them in their head office at Lucknow.

Q. What was the nature of the business of this partnership in 1948? A. This partnership business was importing heavy chemicals, caustic soda and soda ash.

Plaintiffs' Exhibit 2 (In Part).
R. S. Dass Badhwar—For Plaintiffs—Cross.

Q. Did they use heavy chemicals that they purchased for their own account? A. No, very little.

Q. What was their principal business in connection with heavy chemicals? A. Just to sell.

Q. To resell them? A. Resell them.

Q. Would the firm be what we term brokers in chemicals? A. No. "Dealers," we would call them in India. They would import on their account and sell it.

Q. In connection with the caustic soda that is involved in this action, were they acting as dealers? A. Yes.

Q. For their own account? A. Yes, for their (1277) own account.

Q. Did the partnership resell this merchandise? A. Yes, we have resold.

Q. And did you have a contract in connection with the resale? A. No.

Q. When did the resale take place? A. The resale took place long after it had arrived.

Q. Prior to the arrival of the merchandise, had the plaintiffs agreed to sell it to a third person? A. No.

Q. You mentioned in the course of your testimony that this merchandise, when received, was placed in a warehouse? A. Yes.

Q. Was that a practice of the plaintiffs, to warehouse merchandise of this kind for subsequent resale? A. Yes. Warehouse means go-downs, go-downs which we rented.

Q. Were they warehouses? A. Yes. I don't know what you call them.

Q. You used the term "warehouses." I didn't. A. That is what I meant. The goods, whatever is left, they are lying in the go-downs.

Q. You have mentioned that this shipment, when received in Bombay, was handled by a firm you (1278) described as your clearing agents? A. Yes.

Plaintiffs' Exhibit 2 (In Part).
R. S. Dass Badhwar—For Plaintiffs—Cross.

Q. Who paid the clearing agents? A. We paid.

* * * * * * * * *

(1302) Mr. Dunn: I will put on the record the theory under which damages stated in the complaint were computed.

Mr. Bensel: And what they consist of.

Mr. Dunn: I make this statement without prejudice to the right of disagreement with anything that has been said before on the record.

The sum mentioned as damages in Paragraphs of the complaint designated 8, 31, 34 and 39 is composed of the following elements:

First, the difference in the amount of (1303) import duty actually paid by plaintiffs on the shipment and the amount of duty that would have been levied against the shipment if it had arrived prior to January 1, 1949, at which time an increase in the prevailing rate with respect to this commodity went into effect. The witness has already referred to this duty item of damage upon this examination.

Mr. Bensel: What is it in dollars?

Mr. Dunn: Roughly, about $40,000. I would have to dig up my notes on the computation. That is a matter of arithmetic from the rates given in the testimony.

* * * * * * * * *

(1304) The other element of damage included in the sum mentioned in the complaint, as aforementioned, is a figure computed at 11 rupees per hundredweight, representing the difference between the market price at the place of destination of the shipment between the time when the shipment might have been expected to arrive and the time when it actually did arrive.

Plaintiffs' Exhibit 2 (In Part).
R. S. Dass Badhwar—For Plaintiffs—Re-cross.

The reasons for it not arriving are referred to in the other paragraphs of the complaint.

Off the record.

* * * * * * * *

Mr. Bensel: What is the amount of that in dollars?

Mr. Dunn: $98,112.01.

Mr. Bensel: What date have you taken as the date when you claim the shipment should have arrived?

Mr. Dunn: A date on or prior to November 15, 1948. In other words, November 15th is the last date at which we think the shipment should have arrived, without excluding the possibility of it arriving earlier than that.

Mr. Bensel: In making this computation, what date have you actually taken for the market (1305) price?

Mr. Dunn: The market price we have taken prevailed on and for some time prior to November 15, 1948.

Mr. Bensel: What date have you taken for the arrival, actual arrival date?

Mr. Dunn: Arrived in the harbor on February 26th. We have taken February 28th for the purposes of computation, without excluding the possibility that a date approximate to that, and a little later, might prove to be the correct one to have adopted.

* * * * * * * *

(1340) Re-cross Examination by Mr. Bensel:

Q. You stated in answer to your counsel's question that you wrote letters to other persons to be communicated to Colorado Fuel & Iron Corporation? (1341) A. Yes.

Plaintiffs' Exhibit 2 (In Part).
R. S. Dass Badhwar—For Plaintiffs—Cross.

Q. To whom were you referring? A. To the National City Bank of New York at Bombay, who were the intermediaries in this transaction.

• • • • • • • • •

(1351) Cross Examination by Mr. Scott:

• • • • • • • • •

(1353) Q. When was this caustic soda purchased? A. August, 1948.

Q. Did you buy it to resell? A. Yes.

Q. Was it speculation? A. Yes.

• • • • • • • • •

(1356) Q. When did you receive this caustic soda from the Bombay Port Trust? A. It was in March, 1949.

Q. I show you a paper dated November 27, 1950, on the letterhead of the Bombay Port Trust and ask you whether that document correctly reflects the dates of delivery. A. That would be correct.

Q. That was delivery by the Bombay Port Trust to your partnership? A. Yes.

Mr. Scott: Mark it for identification.

(Paper dated November 27, 1950 on the letterhead of Bombay Port Trust marked Defendant Isbrandtsen's Exhibit C for Identification, 12/4/50, I. R. S.)

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Plaintiffs' Exhibit 2 (In Part)

Defendant Isbrandtsen's Exhibit C in Badhwar Deposition.

BOMBAY PORT TRUST.

No. AC/2-1754 27th November 1950

From The Deputy
Alexandra
Bombay

To

Messrs. Shaw Wallace & Company Limited,
Bombay.

Subject.—s.s. "Hawaiian" IGM No. 1294 of 26-2-49—
Reference: Your letter No. SH/CS dated 23-11-50—

The consignments in question have been delivered as under.

Item No.	*Marks & Nos.*	*No. of Pkges.*	*Date of Delivery*
2	Mulkraj Lucknow via B'bay 1/3217	182	7-3-49
	"	498	8-3-49
	"	428	9-3-49
	"	262	do.
	"	610	10-3-49
	"	278	11-3-49
	"	660	14-3-49
	"	299	16-3-49
		3217	
3	"	533	12-3-49
	"		
	3218/4799		
	"	22	do.
	"	652	13-3-49
	"	148	14-3-49
	"	211	16-3-49
	"	16	17-3-49
		1582	

Illegible
Dy. Manager,
Alexandra Dock

Seq/D

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

Q. Do you know the date when this caustic (1357) soda was delivered by the ship to the Bombay Port Trust? A. It was, you see, on the same dates when we were removing.
Q. Do you know that of your own knowledge? A. Yes.

* * * * * * * * *

(1371) The Witness: I don't know.

Q. You still have some of this caustic soda, have you not? A. Yes.
Q. How much? A. When I left I had about one thousand tons, and I left on the 19th of July.

* * * * * * * * *

Plaintiffs' Exhibit 3 (In Part).

(Masse Deposition)

* * * * * * * * *

(2)

JOSEPH H. MASSE, being duly sworn by Harriet C. Thirkield, Notary Public, as a witness on behalf of the American-Hawaiian Steamship Company, testified as follows:

By Mr. Tillinghast:

Q. Where do you reside? A. 88 West Plain Street, Wayland, Massachusetts.
Q. Are you a seafaring man? A. Yes.

* * * * * * * * *

Q. What license do you hold? A. I hold a master's license, all oceans.
Q. All oceans, all types of vessels? A. Yes.

* * * * * * * * *

Plaintiff's' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

(3) Q. By whom were you employed in August 1948? A. American-Hawaiian Steamship Company.

Q. As an officer on their vessels? A. Yes.

Q. Are you still so employed? A. Yes.

Q. How long before August 1948 were you so employed, if you were? A. I have been with the American-Hawaiian Lines since 1924.

Q. Are you experienced in the management and navigation of ocean-going vessels? A. Yes.

Q. In August 1948, to what ship were you assigned? A. Assigned to the steamship "Hawaiian".

Q. In what capacity? A. As master.

Q. By whom was the steamship "Hawaiian" owned? A. The "Hawaiian" is owned by the American-Hawaiian Steamship Company.

Q. Was the vessel at that time in the service of her owners, or on charter? A. Sh was on time charter to Isbrandtsen.

Q. I show you this paper, and ask you if you have seen the original of it? A. Yes.

Q. What is that paper? A. This is the time charter of the "Hawaiian" to Isbrandtsen.

Q. This is a photostatic copy of a time charter between American-Hawaiian Steamship Company and Isbrandtsen Company, (4) Inc., dated August 17, 1948, is that correct? A. Yes.

Mr. Tillinghast: I offer it in evidence.
It is marked Masse Exhibit 1.

Q. Was a copy of the charter delivered to you in August 1948? A. Yes.

Q. Was delivery of the vessel ever made under the charter party which we have been discussing? A. Yes, the vessel was delivered as the vessel passed Quarantine on the voyage to Houston.

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

Q. Was that the voyage out from New York? A. Out from New York, yes.

Q. Do you remember the date? A. I think it was the 19th of August, 1948.

* * * * * * * *

Q. Did you receive any direction with respect to the (5) itinerary of the vessel before the vessel sailed from New York? A. Yes, I believe I had a letter of instructions from Isbrandtsen, telling me to proceed to Houston and pick up this cargo at Houston, and proceed to New Orleans and pick up cargo at New Orleans.

* * * * * * * *

(6) Q. On what date did you arrive at New Orleans? A. Arrived at New Orleans on the 30th of August, 1948.

Q. Did you report to anyone at New Orleans when you arrived there? A. I reported to Isbrandtsen's agents again—Hansen & Tidemann.

* * * * * * * *

(7) Q. When did you commence loading when the vessel was at New Orleans? A. Commenced loading on the 30th of August at noontime—1 o'clock.

Q. Will you describe in some particularity the loading process? A. That is how I refreshed my memory, that we started at 1 o'clock—we finished the bunkering in the morning and we started one gang at 1 o'clock.

Q. On the 30th of August? A. The day she arrived, yes.

(8) Q. Who hired the gang—by gang, you mean stevedores? A. Stevedore gangs, yes.

Q. Do you know who hired those stevedores? A. Hansen & Tidemann, Isbrandtsen's agents.

Q. Do you know who paid the stevedores? A. Isbrandtsen.

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

Q. Was the vessel's gear used to load the cargo? A. Oh yes.

Q. Who operated the winches? A. The stevedores operated the winches.

Q. Who prepared the vessel's holds for the receipt of cargo, by laying dunnage and so on, if that was done? A. The stevedores.

Q. Do you know who furnished the dunnage? A. I don't know, that would be for Isbrandtsen's account.

Q. With respect to the loading, what did you personally do, if anything? A. I didn't do much, just watched the cargo that went into the ship so I would be familiar with it, that is about all, just to see that the ship was stable.

* * * * * * * * *

(9) Q. Was the cargo loaded from a lighter or from the dock, Captain? A. Most of the cargo was loaded from the dock.

* * * * * * * * *

Q. Do you recall what cargo was loaded at New Orleans at this time, Captain Masse? A. At New Orleans the bulk of the cargo was caustic soda, soda ash, lube oil and crated automobiles.

Q. Do you recall where the caustic soda was stowed? A. The caustic soda, being heavy, most of it was in the lower hold.

(10) Q. Did you notice by any chance the methods of dunnaging the cargo loaded at New Orleans? A. Yes, each tier of caustic soda was striped off with a layer of dunnage to distribute the weights evenly, where any cargo was to be loaded on top.

Q. Was that done with respect to the caustic soda? A. Yes.

Q. You mean that each tier was separated by a floor of dunnage? A. A floor of dunnage, yes.

* * * * * * * * *

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

Q. Do you recall where the drums of caustic soda were stowed in relation to other cargo in the hold? A. The drums of caustic soda were stowed in the lower hold, if my memory is correct, I think they came up three high—three drums high—and then that left just about headroom enough that we could top off with crated automobiles.

Q. Did loading at New Orleans continue continuously? A. Yes, during the working periods, stevedores' straight time hours, the work continued.

Q. Until when? A. Until September 3rd.

Q. What happened on the 3rd of September? A. On the (11) 3rd of September the black gang—the engineroom gang—said they wouldn't supply steam any more to the winches, because they were going on strike.

Q. What time of day was that, do you remember? A. About 10 o'clock in the morning, and I talked to them and I asked them to keep supplying steam until we had had an opportunity to get the perishable foodstuffs off the ship, and they supplied steam until around 4 o'clock that afternoon but they wouldn't supply steam—they threatened not to supply steam for the winches in the morning.

Q. In other words, to load or discharge any more cargo? A. For lifting any more cargo.

* * * * * * * * *

(12) Q. Had you had any notice prior to 3 A. M. on September 3rd that any of your men were going on strike in any department? A. No, sir.

Q. So it was a surprise to you? A. A surprise to me.

Q. How many men were left after the black gang left on the afternoon of the 3rd? A. I think two engineer officers and three deck officers.

Q. And of the crew members? A. The crew members had left the ship.

Q. Do you remember the names of the unions which

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

enjoyed the membership of the crew of the Hawaiian—do (13) you know the name of the union for the stewards department? A. Marine Cooks & Stewards—M. C. &.S.

Q. And the engineering gang? A. The engineers—that is the black gang—is the Marine Firemen, Oilers & Wipers.

Q. And the sailors? A. The sailors were S.U.P.—Sailors Union Pacific.

Q. That is the deck department? A. That is the deck department.

Q. And your communications men? A. American Communications Association—A.C.A.

Q. How much cargo, with respect to the ship's capacity, was loaded when the last of the crew members went on strike? A. The vessel was about two-thirds loaded at that time.

Q. Was there other cargo alongside which was in the course of being loaded, on the dock? A. Oh yes, there was still cargo on the dock.

Q. Was any of that loaded thereafter? A. No, sir.

Q. Why? A. Because the black gang was on strike and they wouldn't supply steam for the winches.

Q. Was any cargo discharged from the ship thereafter? A. No, no cargo was discharged.

Q. Why? A. For the same reason.

Q. Did you receive a request from anyone to discharge (14) any of the cargo which had been loaded between the 3rd of September and about the 10th of December? A. No.

Q. How long did the strike last, Captain Masse? A. I think it was 107 days.

Q. Until what day? A. December 7th.

Q. Was this a strike localized to the crew and men of the "SS Hawaiian", or the American-Hawaiian Steamship Company, or was it a general strike, do you know? A. A general strike for all ships that had those union men working for them.

Plaintiffs' Exhibit 3 (In Part).

Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

Q. Do you know how the strike was declared—was the strike call issued from the main union office or the local office of the union? A. I believe it was all from San Francisco—the main office.

Q. Were there watchmen on the ship during these 107 days, to watch? A. Yes.

Q. Do you know who hired the watchmen? A. Hansen & Tidemann, the agents for Isbrandtsen.

Q. The 107 days period expired when? A. I believe the date was December 7th.

* * * * * * * * *

(15) Q. Do you know from whence their information came? A. No. I don't know that.

Q. What occurred on the 7th of December 1948, with respect to the "SS Hawaiian"? A. Well, the crew returned to the vessel, and we got up steam and returned to our dock in Westwego—that is, returned to Isbrandtsen's dock at Westwego—to resume loading.

* * * * * * * * *

(16) Q. Describe the continuation of the loading at New Orleans. A. We went to the Westwego dock and picked up the rest of the cargo at Westwego, and the vessel shifted to Dumeine Street wharf in New Orleans, and we resumed, or continued loading at that dock.

Q. Who did the loading and the stowing of the cargo? A. The local stevedores for Hansen & Tidemann, as agents.

Q. And you merely supervised the stowage with respect to the stability and trim of the vessel? A. Yes.

Q. Do you remember what day you completed loading at New Orleans? A. On December 19, 1948.

Q. And did the vessel sail? A. The vessel sailed from New Orleans for Tampa, Florida.

* * * * * * * * *

(17) Q. When did the vessel sail from Tampa? A. On December 24th, Christmas evening.

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Direct.

Q. And what was her destination? A. Her destination was Port Said, Egypt, the first port.

Q. And on whose orders did the vessel sail for Port Said? A. On the charterer's orders.

Q. Where did you receive those orders, did you say, Captain? A. There is a change there now, Captain Kacocha took command of the ship.

Q. Where and when did Captain Kacocha take command? A. Captain Kacocha took command of the ship around the 1st of December at New Orleans, a little after the 1st.

Q. Was Captain Kacocha the regular master of the "SS Hawaiian"? A. Yes, he was the regular master.

* * * * * * * * *

(18) Q. On what day did the vessel arrive at Bombay? A. The vessel arrived at Bombay on the 25th of February, 1949.

Q. To what dock did the vessel proceed? A. I believe it was Pier 17 in Bombay.

Q. Do you know who owns and operates Pier 17 in Bombay? A. I believe it is a Government owned dock.

* * * * * * * * *

(19) Q. Describe the discharging process, please, Captain. A. They discharged the cargo in the usual practice.

Q. Who did? A. The stevedores.

Q. Did you see anything wrong with the method used? A. No.

Q. Did you see the cargo as it went out? A. Yes.

Q. Did you observe any damage to the cargo as it was discharged? A. I didn't see any damage to the cargo that was out of the ordinary wear and tear of handling.

* * * * * * * * *

(20) Q. Was all the caustic soda carried on this voyage discharged at Bombay? A. Yes.

* * * * * * * * *

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Cross.

(21) Cross Examination by Mr. Scott:

* * * * * * * *

(22) Q. I show you another paper, and ask you if you know what that is? A. Yes, this is the stowage plan made up by Isbrandtsen's agents, Hansen & Tidemann.

Q. Did you ever see it before? A. Not this sheet of paper, no, sir.

Q. Did you see a copy of it? A. Wasn't that photostatic plan a copy of this—that plan you have—I saw that plan, I saw that photostatic copy.

Q. That represents a loading of this vessel? A. As far as I can determine, this represents the loading of the vessel, yes, sir.

Mr. Scott: I ask to have it marked for identification.

It is marked Isbrandtsen Exhibit A for identification.

Q. Who employed and paid the crew of this vessel? A. The American-Hawaiian Steamship Company.

Q. Who determined the working hours and working days? A. The working days were determined by the union, (23) by union agreement with the steamship company.

Q. Does that apply to working hours? A. That is for the crew members?

Q. Yes. A. Yes, they are all under agreement between the unions and the steamship company.

Q. Who dealt with the crew respecting labor matters—did you deal with them on behalf of the owners? A. Well, I guess I should say yes.

* * * * * * * *

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Cross.

Q. What date then did you finish discharging? (24) A. Finished discharging on the morning of March 13th.

Q. So all the cargo carried to Bombay on this voyage was discharged during the period from March 3rd to 13th inclusive, is that correct? A. Yes. I see an entry here on March 12th, at 8.20 P. M., all cargo out of No. 4 hatch, all Bombay cargo out of vessel, stevedores leave ship.

Mr. Tillinghast: That is March 12th?

The Witness: That is March 12th instead of the 13th. On the 13th the ship departed at 9.45 A. M., and the cleaning gang working through the night, but the cargo was out of the vessel at 8.20 P. M. on March 12th.

Q. Captain, you referred to an entry—will you state what that entry appears in? A. The entry appears in the rough bridge log of the steamship "Hawaiian."

* * * * * * * *

(27) Q. Do you remember the speed capacities of the "SS Hawaiian"? A. Her speed was about 11½ to 12 knots, but I think our charter here only called for 10 knots.

Q. When you left New York, did you have any cargo aboard? A. No.

Q. Did you have a full crew? A. Yes.

Q. Was there a roster of the crew kept? A. Yes.

(28) Q. Where would that be? A. That would be with the United States Shipping Commissioner.

Q. Were all of your crew members union men? A. Yes.

Q. How about your officers? A. The same thing.

Q. Including yourself? A. Yes.

Q. What union did you belong to at the time, Captain? A. At that time I didn't belong to a nion. All the officers belonged to the Master, Mates & Pilots at that time.

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Cross.

Q. You mean you did or did not belong to the Master, Mates & Pilots? A. I did not belong at that time.

Q. Did you subsequently join that union? A. Yes.

Q. Were you a member of any union at the time of this particular voyage? A. No, sir.

Q. Did you have any knowledge of any sort that a strike had been threatened and enjoined by a Federal Court on the Pacific Coast, involving your employers, American-Hawaiian Steamship Company and several unions as well as other shipping companies?

Mr. Knecht: I object to the form of that question.

A. I had no knowledge of any impending strike, and knew nothing of this Court injunction you mentioned.

Q. Will you tell us your whereabouts immediately prior to the time you assumed command of the "SS Hawaiian"? (29) A. I believe I was working in New York City.

Q. During the period from June 1st, we will say, to August 19th? A. I am not sure whether I was home during that period or not.

Q. By home do you mean your residence in Massachusetts? A. Yes, my home in Massachusetts, that is right.

Q. In connection with your occupation as a sea captain, did you keep abreast of such things as maritime strikes? A. That is a difficult question to answer, but I guess it is, yes.

Q. Were American newspapers available to you at your home in Massachusetts during that period? A. Yes.

Q. Did you read them usually? A. Yes.

Q. Were you, during that time, in touch with maritime activities that would bring you to New York or to other ports? A. Yes.

Q. During that time, did you have occasion to talk with any men who followed the sea or were connected with maritime activities? A. Yes.

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Cross.

Q. Based on all of those things, and refreshing your recollection, can you tell us whether you had heard or knew from any source of a threatened strike in the maritime industry? A. No, this strike was a surprise to most everybody. I didn't hear anything prior to the time the men walked off the ship about an impending strike or (30) threatened strike.

Q. That is your testimony, Captain Masse, after having reflected on it? A. Yes..

Q. Do you mean particularly that it was a surprise to you as well as to most anybody? A. It was a surprise to me, and people that I had been talking to after the thing had broken mentioned that they were surprised that the strike was called.

Q. Did you ever talk to anybody about it prior to the time that the men walked off the ship, as you testified to? A. No, sir.

* * * * * * * *

(35) Q. Did any representatives of any labor unions come aboard the ship when you arrived in New Orleans? A. Not to my knowledge.

Q. Did any labor representative come aboard the ship at any time during the stay on New Orleans? A. Not to my knowledge.

Q. Do you mean by that— A. That I didn't see them, and didn't hear of them, didn't see them or hear that they (36) were aboard.

Q. Continuing with the loading schedule: When did you commence loading on September 1, 1948? A. (Referring to log) At 8 A. M. on September 1st.

Q. And what time did you stop loading for the day on that date? A. At 1800.

Q. That would be 6 P. M.? A. 6 P. M.

Q. When did you next resume loading? A. At 7 A. M. on September 2nd.

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Cross.

Q. When did you cease loading on September 2, 1948? A. At midnight knocked off all gangs for supper.

Q. When did you again resume loading? A. At 1 A. M. on September 3rd.

Q. And when did you cease loading on September 3rd? A. At 10 A. M. on September 3rd.

Q. At whose instructions did loading cease on September 3rd? A. I know on that schedule you have there it says "Master", but that schedule don't mean a thing—here is the official logbook here.

Q. The question is: At whose instructions did loading cease? A. The firemen refused to supply any more steam for the loading operations, and consequently the stevedores knocked off.

Q. How was it communicated to you, if it was, that the firemen would not supply any more steam, at 10 A. M.? (37) A. One of the firemen told me.

* * * * * * * * * *

(38) Q. Did you know this fireman to be a union delegate or labor representative of the engineroom gang in any capacity? A. I know he was one of my firemen, but his capacity, as far as the union is concerned, I don't know—I have forgotten whether it was the ship's black gang delegate that gave me this information or whether it was one of the other firemen, I don't know which one of the three firemen told me.

(39) Q. As master of the ship, did you consider yourself in a position to order him or the firemen to resume or continue their work? A. They were under orders to continue supplying steam but they refused to supply the steam because they were going on strike.

Q. Did you make any other effort to verify whether they were on strike, other than the statement of this particular fireman whom you cannot identify or remember? A. They all packed their clothes that day and went off the ship, which is a form of a strike, isn't it?

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Cross.

Q. (Repeated) Did you make any other effort to verify whether they were on strike, other than the statement of this particular fireman whom you cannot identify or remember? A. Yes, I spoke to other crew members.

Q. Can you either identify them individually or describe who they were with respect to their jobs on the ship? A. Well, they were my crew members and they had a job to perform, and they said they were going out on strike, and that was it.

Q. Will you tell us just when and where those conversations took place? A. No, I can't tell you that, I can't determine just what part of the vessel I was standing at the time.

Q. Can you tell us with respect to time when such conversations took place? A. Yes, between 9 and 10 A. M. on the morning of September 3rd.

* * * * * * * *

(46) Q. Were you present on the ship during September 2nd and the night thereof? A. Yes.

Q. The firemen in your crew, I believe you have stated, were members of the Marine Firemen, Oilers & Wipers—is that the same as the Pacific Coast Marine Firemen, Oilers, Water-tenders & Wipers Association? A. That is right.

(47) Q. An independent union? A. That is right.

Q. The cooks and stewards on your vessel at the time were, as I think you have stated, members of the National Union of Marine Cooks & Stewards, is that correct? A. That is right.

Q. And that is the CIO Union? A. That is right.

* * * * * * * *

(48) Q. Did the stevedore ever talk to you at all about an impending strike? A. No.

Q. Or did he talk to you about any strike meeting? A. The stevedore, no.

Q. Did any of the people from Hansen & Tidemann talk

Plaintiffs' Exhibit 3 (In Part).
Joseph H. Masse—For American-Hawaiian Steamship Company—Cross.

to you about any strike meetings or impending strike? A. Not before—not prior to September 3rd.

Q. Was any discussion of any strike situation had by you with anybody, prior to September 3rd? A. Prior to September 3rd I didn't know a thing about any strike or impending strike.

* * * * * * * * *

(55) Q. Are you acquainted with Mr. Burke's handwriting? A. Yes. That looks like Mr. Burke's signature.

Mr. Tillinghast: You are familiar with Mr. Burke's signature?

The Witness: Yes.

Q. Can you then identify that document and tell us what it is?

Mr. Tillinghast: If you know.

A. This document is prepared by the dock force and is given to the mate at the end of the day, which tells him the commodities that went into each of the hatches that they are loading and the day's tonnage. It is just the glorified form of a tally sheet.

Q. It is headed up "Mate's daily report", is it not? A. Yes.

Q. And it is signed at the bottom by William G. Burke, first mate? A. Yes.

Mr. Dunn: I ask to have it marked for (56) identification.

It is marked as Plaintiffs' Exhibit 2 for identification (six sheets).

* * * * * * * * *

Plaintiffs' Exhibit 2 in Masse Deposition.

(Mate's Daily Reports; 6 Sheets)

(See opposite ☞)

* * * * * * * * *

Note:

Page 97a (6sheets) is on card 7

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

(58) Q. Is it a correct statement of your position to state that you had no knowledge whatever of any impending or threatened strike, or strike situation, prior to September 3rd at 10 A. M. when the fireman came and reported to you that they were on strike? A. That is true.

* * * * * * * *

Plaintiffs' Exhibit 4 (In Part).

(Dalton Deposition)

* * * * * * * *

(593) JOHN HANSEN DALTON called by and on behalf of the Plaintiffs, being first sworn by a Notary Public, was examined and testified as follows:

* * * * * * * *

(594) Direct Examination by Mr. Dunn:

Q. What is your present occupation or position? A. Well, I am a steamship agent.

Q. What is the name of your firm, please? A. The present name is Tidemann & Dalton, Inc.

Q. Is that firm the successor to Hansen & Tidemann, Inc.? A. There are two Tidemann & Dalton, Inc. firms, one is operating under a Louisiana charter and the other is operating under a Texas charter, both operating with the same name. The one operating under the Texas charter is the mother company, the Louisiana corporation was formed from assets of Tidemann & Dalton Corporation, a Texas corporation, which originally was Hansen & Tidemann, Inc.

Q. So that, regardless of details, you are a continuation (595) of the original business? A. I would assume so; I don't know the legal aspects of it.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

Q. Prior to the formation of the firm, you have just mentioned, what was your occupation or petition? A. Steamship agent.

Q. Were you then with Hansen & Tidemann, Inc.? A. That's correct.

Q. Would you tell us how long your association with Hansen & Tidemann, Inc. continued? A. From the time they originally organized in 1936.

Q. Until— A. Well, till the present day or until we changed the name to Tidemann & Dalton, Inc.

Q. And what was your position with Hansen & Tidemann, Inc. in 1948? A. I was a vice-president and secretary.

Q. Does your experience in the Maritime Industry date back to 1936 or even prior to that? A. Prior to that.

* * * * * * * *

(596) Q. Now, generally speaking, in your position as a steamship agent, you, of course, have to deal constantly with steamship companies and ships and owners? A. That's correct.

Q. And with other steamship agents, I take it? A. From time to time.

Q. Deal with underwriters at all? A. It depends on the circumstances; it depends on what you mean by underwriters.

Q. Well, do you have anything to do with the underwriters' inspectors? A. You mean the Board of Underwriters of New York, for instance?

Q. Any underwriters, just a general question? A. I don't know the definition of underwriters. There is an organization known as the Board of Underwriters of New York, or New York Board of Underwriters, I don't know which, who has certain inspectors who supervised (597)

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

the proper loading and discharging in the case of vessels. Those inspectors we have daily dealings with. As far as I know, there are other underwriters, different insurance companies, but I don't know very much about those people.

Q. You also have occasion to deal regularly with stevedoring companies? A. Yes.

Q. And with freight forwarding people? A. Yes.

Q. And with ships' captains and ships' personnel? A. I would say yes, qualifying that that my position is an executive position, so I may possibly not deal directly with each ship's captain or ship's personnel.

Q. So that you come into contact, as a part of your business, with most of the specialized branches of the Maritime Industry? A. Generally, yes.

* * * * * * * *

(610) Q. Was your firm the agents, acting in connection with the steamship Hawaiian in New Orleans on or about August 31, 1948? A. If my memory serves me correctly, I believe that we were acting in the capacity of agents for a New York ship operator, not for the owners of the vessel.

Q. What was the position with respect to the vessel of the New York Steamship company for which you were acting? A. As I understood it at that time, the vessel was on time-charter to the particular people we were representing, but of that, I wouldn't be sure. I just understood that was the case.

Q. What was the name of the charterer? A. Isbrandtsen. If he was the charterer, I assume he had the vessel under time-charter, and that was the way I understood it. We were acting as his agent.

* * * * * * * *

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

(611) Q. When were you engaged by the Isbrandtsen to act as agents for that ship? A. I wouldn't be able to remember the exact time. If my memory is correct, I believe we were Isbrandtsen's agent during that particular time that you mentioned, in which case we would ordinarily be his agent for any vessel that he controlled.

* * * * * * * *

(612) Q. I show you a paper (hands document to witness), and ask you if that paper came from your office? A. I couldn't answer that. This is not our letterhead. It appears to be an extract of the Port log for the Hawaiian, but I wouldn't be able to say under oath that this paper came from my office. Papers of this nature customarily are made up by us or any other agent on vessels we may be agents for; we and other (613) agents, I assume follow the same procedure.

Q. Will you please read that paper and see if it refreshes your recollection? Take all the time you want, Mr. Dalton? (Hands document to witness.) A. Well, in what way would it refresh my recollection?

Q. The last question concerned the time of arrival of the vessel S/S Hawaiian at the Port of New Orleans? A. Well, it does on this paper. She arrived on August 30, 1948 at 1325 hours past Pilottown—which is not the Port of New Orleans—but arrived at Chalmette, Louisiana which is in the Port of New Orleans at 2015 hours. I mean, that's three and a half or better years ago; I wouldn't know whether this is correct or not.

* * * * * * * * *

(514) (The document referred to was marked Defendant "A" for identification and was offered in evidence.)

Plaintiffs' Exhibit 4 (In Part).

Defendants' Exhibit A to Dalton Deposition.

American SS HAWAIIAN

Port Log—New Orleans, Louisiana

GRT 6,264
NRT 3,835

Master: Captain J. H. Masse

1948

Monday August	30	1325	Passed Pilottown
		2015	Arrived Standard Oil Co. Terminal, Chalmette, La.
			On arrival: Draft: Fwd 11′ 10″ Aft 17′ 0″ Bunkers: 1,400 Barrels Water: 160 Tons Stores, etc.: 100 Tons
		2230	Commenced bunkering
Tuesday August	31	0925	Completed bunkering — bunkers lifted 12,443.48 Barrels Bunker "C" Fuel Oil
		1020	Left Bunker Terminal
		1230	Arrived Westwego Wharf No. 3
		1300	Commenced loading cargo
		1700	Stopped loading cargo
Wednesday September	1	0800	Resumed loading cargo
		1800	Stopped loading cargo
Thursday September	2	0700	Resumed loading cargo
		2400	Knocked off for supper hour
Friday September	3	0100	Resumed loading
		1000	Stopped loading cargo—Master's instructions account strike. Vessel released to Strachan Shipping Co. on orders American Hawaiian Line.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

Saturday September 4 through Monday September 6		No work account strike
Tuesday September 7	1440	Left Westwego Wharf—Orders Strachan Shipping Co.
	1630	Arrived at anchorage at Point
Wednesday September 8 through Wednesday September 15		At anchorage—no work account strike

* * * * * * * * *

Q. Do you have any records, Mr. Dalton, a log or schedule of some sort, of the movements for the "SS Hawaiian" showing the time at each point? A. Apparently so, yes.

Q. Would you consult that and see whether you can then (515) answer the previous question as to when the vessel arrived in New Orleans? A. Shall I answer now?

Q. Yes. A. According to these records, she arrived on August 30, at 2015 hours, 1948, at the Standard Oil Terminal in Chalmette, Louisiana, which, I believe, actually is considered a part of the Port of New Orleans—it's a bunker terminal.

Q. When did they get into a loading wharf? A. The records here are 1230 hours, Tuesday, August 31, 1948, arrived at Westwego Wharf No. 3 and at 1300 hours on the same day they commenced loading cargo.

* * * * * * * * *

(517) Mr. Tillinghast:

Q. Were you furnished with a list of cargo to be loaded at the Port of New Orleans when the vessel arrived? A.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

We would prepare such a list ourselves. We would have a booking sheet reflecting what it was that was booked. That wouldn't necessarily mean all cargo was loaded; wouldn't have anything to do with whether it was actually loaded or not loaded.

Mr. Dunn:

Q. Do you remember whether a large number of drums of caustic soda were to be loaded at Westwego, New Orleans? A. Yes.

* * * * * * * *

(619) Q. Who was the particular stevedore? A. I think it was a firm called New Orleans Stevedoring Company, Inc.

Q. Did they customarily handle the stevedoring for Isbrandtsen vessels? A. To the best of my knowledge, they did all of Isbrandtsen's stevedoring in the Port of New Orleans at that time.

* * * * * * * *

(620) Q. What are the customary regular loading hours in this Port, exclusive of overtime? A. I would say on regular working days, from 8:00 o'clock in the morning until noontime, and from 1:00 o'clock in the afternoon until 5:00.

Q. Was there any overtime work in connection with the loading of the "SS Hawaiian"? A. I didn't hear the last part?

(Question read by the Reporter.)

A. According to these records, yes.

* * * * * * * *

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

(621) Q. Please tell us on what days overtime was worked on that particular vessel? A. From these records, I can tell you what time overtime was worked before 8:00 o'clock in the morning and after 5:00 in the afternoon, but I don't know whether any of these days are holidays. Your log wouldn't show that, just shows the time the vessel worked. The log does not show the word "overtime," just shows (622) the period worked.

Q. Be good enough to tell us what you can. A. All right. I would say, in my opinion, on September 2, Thursday, 1948, the vessel apparently worked—excuse me, on September 1, Wednesday, 1948, she apparently worked overtime from 5:00 P. M. to 6:00 P. M. The following day, Thursday, September 2, she apparently worked overtime from 7:00 A. M. to 8:00 A. M., from 5:00 P. M. to 6:00 P.M., and from 7:00 till midnight. I will have to qualify that; if the stevedore ordered what we call the night gangs, they would ordinarily come to work at 6:00 P.M.; so, that hour from 6:00 to 7:00 would not be lost. If he worked his regular gang straight through, they would usually knock off at 6:00 P. M. and come back to work at 7:00. My log shows work from 7:00 until midnight, but that's always understood to mean exclusive of supper hour and lunch hour and what have you.

Q. On September 3rd? A. On September 3rd, Friday, he commenced working at 1:00 A. M., and worked till 10:00 A. M. that morning.

Q. Was the loading operation at Westwego completed at that time? A. The entire loading operations?

Q. Yes. (623) A. I don't think so, no.

Q. Do you want to consult your records further because I would like a definite answer? A. I could consult my records if you so desire. It would take some time, but my memory is reasonably clear on that point except that—

5M-7-47-H

HANSEN & TIDEMANN, INC.

STEAMSHIP AGENTS

Aug 24 48

MATE'S DAILY REPORT—Pier No. Wes. 90

Received alongside in apparent good order the following cargo, marked as below, subject to all conditions and exceptions contained in the Ocean B/L of the Steamer or Steamship Line.

BENT No.	WHERE FROM	MARKS	QUANTITY	REMARKS
#1 Hold				
PEN	760 V	Muchraj	37	D/Caustic Soda Bombay
CO	9062		11	- do - do
#2 Hold				
CEQ	8V306		11	- do - do
DRGW	67848		11	- do - do
KNG	106V33		11	- do - do
#4 Hold			34	
IC	17421		11	- do - do
FJE	60843		11	- do - do
MIL	2304V		11	- do - do
#V	Hold			
WP	20437		11	- do - do
NP	50157		11	- do - do
PEN	10116		11	- do - do
#1	V.T.	Tons		
#2	97	do		
#4	104	do		
#V	58	do		
		342	Tons	

Vessel Hawaiian for Los Angeles Received Today 342

Wes. 90 Aug 24 1948 Received Previously

Cargo Officer William F. Burke TOTAL 342

5M-7-47-H.

9/1/48

HANSEN & TIDEMANN, INC.

STEAMSHIP AGENTS

MATE'S DAILY REPORT—Pier No. Westerveg

Received alongside in apparent good order the following cargo, marked as below, subject to all conditions and exceptions contained in the Ocean B/L of the Steamer or Steamship Line.

BENT No.	WHERE FROM	MARKS	QUANTITY	REMARKS
# 1	Hold	Mucbraj		
PENN	76053		197	Drums of Caustic/s Bombay
PM	82979		115	
NW	43896		1N	
NH	33296		1N	452
# 2	Hold			
IHB	10296		1N	
ACL	07292		1N	
ATSF	14060		1N	
NKP	22110		1N	
RI	147443		10	10
# 4	Hold			
WP	187374		114	
NYC	16172		1N	
NYC	17844		1N	
# 5	Hold		3	
NYC	121194		112	
MILW	71687		1N	
RDG	10514		14	
PRR	6703		1N	
CNW	84234		1N	
PRR	10144		1N	
PRR	78106		1N	
			3	
	#1-Hold -	134 Tons		
	#2-Hold -	175		
	#4-Hold	114		
	#5 Hold	258		
		681-Tons		

Page #1

bl Stuffing

Vessel HAWAIIAN for Bombay

Sept 1 1948

Cargo Officer Wm. J. Burke Mate

Received Today 681 Tons

194 Received Previously 342 Tons

TOTAL 1023 Tons

5M-7-47-H

HANSEN & TIDEMANN, INC.

STEAMSHIP AGENTS

(Page 29 - Sheet 3)

Sept 1st 1948

MATE'S DAILY REPORT—Pier No.....

Received alongside in apparent good order the following cargo, marked as below, subject to all conditions and exceptions contained in the Ocean B/L of the Steamer or Steamship Line.

BENT No.	WHERE FROM	MARKS	QUANTITY	REMARKS
#-1,	Hold - Square	AUTO THENE NISAT FOR		
W M	√0749	KHOORMSHAR	2	Boxed Vehicles
PENN	34√√√2	IN-TRASIT √	3	√ —
		FA KERTANCH LTD		
# 4	Hold T/D WINGS	BASRAH		→ Boxed Vehicles
RDG	32722	√	8	— —
NYC	71193		6	√ —
NYC	710663		4	
ERIE	107√6		6	
	# 1 - 3 TONS			
	# 4 - 32 TONS			
	35 - TONS			
				Sept 1, 1948
				Sept
				Pag # 2
				√
		# 1 - Hold KHOORMSHAR		
		# 4 for Basrah		

Vessel HAWAIIN Received Today 716

..... 194 Received ~~Previously~~ 342

Cargo Officer Wm. G. Burke 1st Mate TOTAL 1058

5M-7-47-H.

Sept 2nd 1948

HANSEN & TIDEMANN, INC.

STEAMSHIP AGENTS

MATE'S DAILY REPORT—Pier No. Westwego

Received alongside in apparent good order the following cargo, marked as below, subject to all conditions and exceptions contained in the Ocean B/L of the Steamer or Steamship Line.

BENT No.	WHERE FROM	MARKS	QUANTITY	REMARKS
#1 Hold.				
PM	82976	MACKMAN	30	O/carrier Soda - Bombay
CRP	22857 - Split		80	
CRP	2285 of Overlap O/wings		35	
#2	Hold			
RI	147443		6	
TNO	14988		1	
#4	Hold-FWD			
DLW	11503		11	
CRF	22877		11	
NP	26900		11	
NP	26993		11	
LN	15134		11	✓
ATSF	8807		11	
CN	31121	114	11	
#5	Hold			
PRR	78106	100	11	
ITC	6499		11	
TNO	14912		11	
NW	46060		11	
			6	
	#1 - Hold	97 TONS		page #1
	#2 - Hold	68 - TONS		
	#4 - Hold	279 - TONS		
	#5 - Hold	115 - TONS		See page #2
		519 - TONS		

Vessel HANNAH for BOMBAY

Sept 2nd 1948 194

Cargo Officer Wm. T. Burke 1st mate

Received Today

Received Previously

TOTAL

5M-7-47-H

HANSEN & TIDEMANN, INC.

STEAMSHIP AGENTS

MATE'S DAILY REPORT—Pier No. Westwego

Received alongside in apparent good order the following cargo, marked as below, subject to all conditions and exceptions contained in the Ocean B/L of the Steamer or Steamship Line.

BENT No.	WHERE FROM	MARKS	QUANTITY	REMARKS
#1	Lower Hold	Auto Thereon S/T For Khorramshahr		
Pen	3 4 5 5 2	✓	3	Pkgs Autos & Parts
B & O	262744	✓	✓	" " "
#1	Or Cop Deck Fwd.			
W H	50749	✓	2	" " "
#2	Hold Square			
B & O	262744	✓	9	" " "
Pen	3 4 5 5 2	✓	8	" " "
W H	50749	✓	2	" " "
			29	= 56 TONS
		F A Nettaneh & Co Ltd		
		Basrah for Bagdad		
#1	Or Cop Deck	Various Cars	22	Pkgs Auto Parts
#2	Lower ✓	✓	18	" " "
#4	Hold	✓	10	" " "
✓	✓ D	✓	19	" " "
#5	Hold	✓	16	" " "
✓	✓ D	✓	8	" " "
#1	Lower Deck	✓	11	" " "
#2	Hold	✓	16	" " "
#4	✓	✓	21	" " "
#5	✓	✓	23	" " "
#8	Lower Deck	✓	18	" " "
			192	= 247 Tons
	Page #2 Sept 2nd/48			

Vessel Hawaiian for Various Received Today 822

Westwego Sept 2 & To 7 am 9/3 194 8 Received Previously 1058

Cargo Officer Wm. H. Burke 1st Mate TOTAL 1880

5M-7-17-H.

HANSEN & TIDEMANN, INC.

STEAMSHIP AGENTS

(Page 93-Sheet 6)

MATE'S DAILY REPORT—Pier No. West 7 & 9

Received alongside in apparent good order the following cargo, marked as below, subject to all conditions and exceptions contained in the Ocean B/L of the Steamer or Steamship Line.

BENT No.	WHERE FROM	MARKS	QUANTITY	REMARKS
#1 & TD		~~Basra to Bagdad~~ ~~S.A. Exp.~~		
		F A Kettaneh & Co Ltd		
		Basra & for Bagdad		
	Various Cars		✓	Pkgs Autos & Parts
#2 & TD	✓		6 ✓	✓ ✓
#4 - ~~do~~ ~~Hold~~	✓		2 ✓	✓ ✓
#5 Hold	✓		4 ✓	✓ ✓
			17 = 32 TONS	

Vessel Hawaiian for Various Received Today 32

Sht 3 of 7 1918 Received Previously 1880

Log of the S. S. Hawaiian Voy. 6 P.W Date Sept 1, 1918 From Wharf, Wednesday 1918 From Wharf #3 Towards Westwego La.

HOUR	KNOTS	COURSES	WINDS	SEA	BAR.	THERMOMETER AIR WET	THERMOMETER AIR DRY	THERMOMETER WATER	LOOKOUTS	RUNNING LIGHTS WHEN LIGHTED	RUNNING LIGHTS WHEN EXT.	WATCH OFFICER		RUNNING LIGHTS WHEN LIGHTED	RUNNING LIGHTS WHEN EXT.	WATCH OFFICER	REMARKS
A.M.																	
1													Mate M				Mate Mate T.A. Williams on duty. No cargo worked during night. Frequent inspections made about ship.
2													night				
3												3rd Am	Mate M			3rd Am	Mate Mate relieved by ships officer.
4		Calm			2993	72	75					8:00 Am	4 ga			8:00 Am	4 gangs Longshoremen abd. loading #1-2-4&5 hatches.
5												10 30 Am	Steve			10 30 Am	Stevedores K.O. Loading #1&2 close to look of damage.
6	11 45 Am	Mr Tillerson A.B.S. surveyor; Strachan Port Engr.										12 00 N	Repair	Port Engr.		12 00 N	Repair gang starts work on shaft tunnel.
7		Mr Camelle & Ferran & Co. Repair contractor abd.										12 00 N	Steve	bd.		12 00 N	Stevedores K.O. for lunch.
8		surveying hole in shaft alley tunnel										1300	Steved			1300	Stevedores resume work in #4 & #5
9												133.0	Steved			1330	Stevedores resume work in #1&2
10		Draft 6 00 Am															
11		F 17 06															
12		A 20 10															
		M 18 09															
P.M.																	
1												1700	Mate M			1700	Mate Mate relieved ships officer
2												1800	Steved			1800	Stevedores K.O. for night
3												150	Repair			158	Repair men (2) cutting on patch plate on shaft casing. welding
4													same (,				same (precaution taken against fire starting from welding sparks)
5		Draft 6 00 pm										2100	finish			2100	finish work on patch plate #4 WH propeller Tunnel & hose
6		F 15 11											tool sa				tool same from inside Tunnel O K
7		N 21 09											Repair				Repair men leave ship
8		m 20 04	Sky 2		2994	73	77						Mate				Mate Mate T.A. Williams on duty. Frequent inspections about ship.
9																	
10												2400	T w'd			2400	T williams relieved by mate Mate F.H. PARDY
11																	

COURSE AND DISTANCE	LAT. BY OBS.	LONG. BY OBS.	LAT. BY ACCT.	LONG. BY ACCT.	DIST. PER LOG	CURRENT	VARIATION	DEVIATION	CURRENT	VARIATION	DEVIATION

BEARING AND DISTANCE AT NOON

J. B. Masse MASTER

MATE

3

No. A-17344

CERTIFICATE OF LOADING

BUREAU OF INSPECTION

—OF—

The Board of Underwriters of New York.

New Orleans, La. DECMEBER 19, 1948

This is to Certify, *That the* AM. S.S. "HAWAIIAN"

whereof C. A. KACOCHA *is Master, of* 3835 *Net Tons Measurement,*

built at PHILADELPHIA PA *in* 1919 *bound for* PERSIAN GULF AND INDIA

has been under the inspection of the undersigned at this port from time to time during the course of her loading; that the stowage, so far as it came under the observation of the undersigned, was in accordance with the rules of The Board of Underwriters of New York.

THIS CERTIFICATE IS NOT A CERTIFICATE OF SEAWORTHINESS

PARTICULARS OF CARGO LADEN.

DRUMS CAUSTIC SODA
CASES AUTO AND PARTS
BAGS SODA ASH
DRUMS LUBE OIL

MISC. GENERAL

DECKLOAD CERTIFICATE ISSUED: S-2286

Total *Bush., equal to* *Tons.*

Draft of water loaded, *ft.* *in. forward,* *ft.* *in. aft.* *Freeboard,* *ft.* *in.*

MEAN DRAFT **ft.** **in.**

J. C. Compliee *Surveyor.*

This Certificate is issued on the conditions that while the Officers and Committees of the Board use their best endeavors to insure that the functions of the Board are properly executed, neither such Officers nor such Committees, nor the Board are under any circumstances whatever to be held responsible for any inaccuracy in any report or certificate issued by the Board or its surveyors, or for any error of judgment, default, or negligence of the surveyors or other employees or representatives of the Board.

This certificate covers only the cargo herein described as having been loaded at New Orleans, La., and under no conditions is it to be deemed to cover any other cargo whether loaded at New Orleans, La. or any other port. If the vessel has loaded or later loads other cargo, for the same voyage, at a United States Port, this certificate of loading shall not be valid unless such cargo, whether loaded at New Orleans, La. or some other United States Port, shall have been, or shall be, loaded under the supervision of a Surveyor of this Board and if loaded at any foreign port, the certificate of loading shall not be valid unless such cargo is loaded in accordance with the rules and regulations of this Board. This certificate shall not be valid if upon sailing from any loading port and/or any fueling port and/or during any part of the voyage, the vessel's draft shall exceed that permitted by the law of her flag and/or the draft designated for the vessel in the Classification Society in which she may be classed.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

as clear as memory can be—that the complete operation at Westwego was not finished, which is indicated by this record that eventually she returned to Westwego and it says in the record, "Resumed loading, Westwego."

Q. Is there any doubt in your mind, Mr. Dalton, on the point as to whether the operation at Westwego was completed when she stopped loading on September 3? A. No, there is no doubt in my mind.

Q. Then, we won't bother— A. There would be a doubt if you asked me exactly what quantity of cargo was either left or not left.

Q. But there was some cargo? A. There was some cargo left.

Q. Why did the vessel stop loading at that time? A. According to these records, at 10:00 A. M., Friday, September 3, reading from the record, "Stopped loading cargo on master's instructions account strike. Vessel released to the Strachan Shipping Company on orders of the American-Hawaiian Line"—

(624) Q. Do you have an entry as to when loading was eventually continued at Westwego? A. Well, this pencil memorandum that's attached to this typewritten record indicates that the vessel returned to the Westwego Wharf on Decembor 9 at 1830 and that she resumed loading on December 13 at 0800.

Q. Does the record you are referring to show an existence or continuation of the strike during that period which intervened between loading operations? A. You mean from the time she stopped until she went back to Westwego?

Q. Yes.

. . . . . .

(637) Q. Mr. Dalton, I show you six sheets headed up "Hansen & Tidemann, Inc., Steamship Agents, Mate's

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

Daily Report—Pier No, Westwego," on the reverse side of which is marked "Plaintiffs' Exhibit 2 for identification, May 29, '51."

I ask you to examine it and identify it for us if you can? A. (Examining document) I would say it is a copy of—well, it says "Mate's Daily Report." I think it means, to my company, that it is a copy of the list of cargo loaded aboard the ship daily and receipted for by the mate of the ship. Is that all right? Is that enough?

Q. Can you so identify it. A. Yes.

Q. Did the original of this photostat originate in your file? A. I would say yes, and our records indicate it was mailed to the operator of the vessel in December of 1950; the originals.

Q. That is to Isbrandtsen Company in New York? (638) A. Yes.

Mr. Dunn: I ask that the exhibit be marked "Plaintiffs'-1 Exhibit-1" for identification on this date.

(The document referred to was marked "Plaintiffs' Exhibit-1" for identification,)

Q. I now show you a photostat of a sheet which is already marked "Isbrandsten Exhibit-A" for identification, May 29, 1951, and ask you if you can identify it for us? A. (Examining document) I would say that is a stowage plan of all cargo loaded aboard this vessel. As there is no signature on it, I don't know whom in our organization prepared it, but it is apparently prepared by us.

Q. Did the original of that stowage plan originate in your file? A. I can't answer that.

Q. In other words, is this a photostat of a document which you have had in your file? A. I would say yes.

Mr. Dunn: I ask that it be marked "Plaintiffs' Exhibit-2" for identification as of this date.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Direct.

(The document referred to was marked "Plaintiffs' Exhibit-2" for identification.)

Q. I show you a letter which is bound with many other (639) documents in your file, which is apparently on the stationery of "New Orleans Stevedoring Company," dated September 2, 1948, addressed to your self and signed by Robert T. Smith, Vice-President & General Manager for New Orleans Stevedoring Company, Inc., and ask you whether or not that letter was regularly received by you and placed in your file? A. I would say so.

Mr. Dunn: I ask that this letter be marked as "Plaintiffs' Exhibit-3" for identification.

(The document referred to was marked "Plaintiffs' Exhibit-3" for identification.)

Plaintiffs' Exhibit 3 to Dalton Deposition.

NEW ORLEANS STEVEDORING COMPANY
INCORPORATED

Phone
RAymond 8151

2012-14 American Bank Building
New Orleans 12
September 2, 1948

Mr. J. Dalton, Vice President
Hansen & Tidemann, Inc.
Carondelet Building
New Orleans 12, Louisiana

Re: SS "Hawaiian"

Dear Mr. Dalton:

This will confirm our telephone conversation of yesterday wherein we advised you that there is a possibility of

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Cross.

being able to sail this vessel from New Orleans Saturday afternoon, weather permitting, at an overtime cost of approximately $1,000.00 to $1,500.00.

In giving you this estimate please bear in mind the difficulty we are encountering in loading the vessel. Due to her construction the parcels of boxed automobiles and hogsheads of tobacco are confronting us with a serious stowage problem and we could possibly encounter unexpected delays in stowing the large boxes of automobiles and trucks and the progress we will make when we start loading them cannot be determined at this time.

We are now chiefly concerned with getting all the cargo on board and in order to do so we cannot concern ourselves too much with despatch even though it could possibly mean a financial loss to ourselves as we understand the gravity of the situation should any cargo be shut out.

Yours very truly,

NEW ORLEANS STEVEDORING CO., INC.
ROBERT T. SMITH
Robert T. Smith
Vice President & General Manager

RTS/akk

* * * * * * * *

(652) Q. In connection with the booking of all of the cargo of caustic soda, who was acting for the shipper? Colorado Fuel & Iron? A. Well, according to the records apparently it was the shipper's broker, Farrell Shipping Company.

* * * * * * * *

(655) Cross Examination by Mr. Bensel:

* * * * * * * *

(662) Q. Well, now, you have produced, clipped together, a communication dated August 25, 1948, from

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Cross.

Farrell Shipping Company, addressed to The Texas & Pacific Railroad Company, to which there is clipped what purports to be an On Board Bill of Lading No. 144, 1948. It bears stamped late at the bottom "September 3, 1948." Now, I ask you whether the copy of the communication of Farrell Shipping Company that I referred to was received by your company on or about the date that it (663) bears? A. If that was received by my company?

Q. Yes. A. Yes. That is called "Shipping Instructions." My company should O. K. those instructions before the carrier will deliver the goods.

Q. And I notice that on this two-page communication from Farrell Shipping Company there is a stamp at the bottom of each page starting out in large letters, "O. K. For Delivery" and then some printed matter and it bears the signature of your company, dated August 31, 1948. Is that correct? A. That is right.

Q. Now, there is attached to this communication this copy of the bill of lading. Is that a true and correct copy of the bill of lading that was issued? A. Yes; as far as I know, it is.

Q. For the number of drums specified therein? A. On that particular bill of lading; yes.

* * * * * * * * *

(664) Q. Well, you look at it and tell me whether it is a clean bill of lading? A. Yes, it is a clean bill of lading. There are no exceptions on the bill of lading.

* * * * * * * * *

(665) Q. And the bill of lading, No. 145, is a true copy of the bill of lading—On Board Bill of lading—that was issued? A. To the best of my knowledge; yes, sir.

Q. And was that likewise a clean bill of lading? A. That is correct.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Re-cross.

Q. And was the freight paid? A. That, I can assure you.

* * * * * * * *

(687) Re-cross Examination by Mr. Scott:

Q. Mr. Dalton, in 1948, your firm, Hansen & Tidemann, were acting as agents for Isbrandtsen Company, Inc., of New York? A. I don't know whether that is true for the whole year of 1948.

Q. In and after August? A. I know that is true in this particular time of which we are speaking.

Q. In connection with this vessel, the S/S "Hawaiian"? A. Definitely.

Q. Through from August until December of that year? A. I would say yes.

Q. When did this firm cease to be agents for Isbrandtsen? (688) A. I don't know the date. I know the circumstances. That is all.

Q. Well, it did cease to be agents for Isbrandtsen? A. It did cease; yes, sir.

Q. And you and your present firm are not now either agents or representatives of the Isbrandtsen Company? A. On no way, shape or form.

Q. Did Hansen & Tidemann issue any orders for the stoppage of work on this loading of this vessel in the first part of September, 1948? They didn't issue any such orders, did they? A. Are you speaking of the day when the vessel stopped working for a long period of time? We ordinarily would inform the stevedore, in unusual circumstances, to work until 8:00 o'clock or until midnight, or until 10:00 o'clock. But if you are referring to the time when the vessel actually stopped working completely, we had nothing to do with that.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Re-cross.

Q. You are referring now to September 3, 1948? A. That is the day when the vessel stopped working completely.

Q. Yes, sir. A. We had no—

Q. You issued no orders? A. Our orders were to the contrary.

Q. You received none from Isbrandtsen? (689) A. No. Our orders from Isbrandtsen were to the contrary.

Q. With respect to bills of lading No. 144 and 145, which have been marked Exhibits "Defendants'—F and H", in this case, which appear to be signed by Hansen & Tidemann, "Per Pro: J. H. Dalton." That refers to you? A. That is correct.

Q. J. H. Dalton? A. That is correct.

Q. You signed those bills of lading? A. I signed the original; yes.

Q. You signed the original bills of lading on the dates specified in the bills? A. Definitely.

Q. At that time were the goods referred to in those bills of lading on board the S/S "Hawaiian"? A. Definitely.

Q. They were on board when the bills of lading were issued and signed? A. Definitely.

Q. Were those bills of lading prepared by Farrell Shipping Company which represented Colorado Fuel & Iron Corporation? A. I can only assume so, as that is customary.

Q. Were they issued and signed by you in the regular course of business? (690) A. Right; that is correct.

Q. And in the regular way? A. That is correct.

Q. Now, after those bills of lading were issued and signed, was any delay in the despatch of that vessel caused by strikes, work stoppages, or other labor difficulties? A. Yes. The records show that the vessel was apparently strike bound for quite a long period of time after the issuance of these bills of lading.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Re-cross.

Q. You had no control whatever over that strike? A. No, sir.

* * * * * * * *

(691) Mr. Scott:

Q. After those bills of lading were issued they were delivered by you or your company to Farrell Shipping Company for transmission to Colorado? A. I believe that is correct.

Q. Did you at any time after those bills of lading were issued and so delivered, receive any request from either Colorado or the consignee or the plaintiff in this action for those goods to be removed from the S/S "Hawaiian", to be shipped in any other vessel? A. I don't think so. To the best of my knowledge, no.

Q. You received no such request? A. As far as I can remember, no.

Q. And either from Colorado or from the plaintiff or from the consignee? A. To the best of my knowledge, no. I don't think it would have been possible to discharge them anyway: discharge the goods that were on board that vessel.

Q. You received no request for the discharge? A. To the best of my knowledge, I did not; no, sir.

Q. Did you notify at any time Farrell about any delay? A. In connection with this caustic soda?

Q. Yes, I am talking about this shipment. The shipments referred to in bills of lading 144 and 145? A. I don't recollect. My memory is not clear whether we (692) notified Farrell or not. There would be no necessity of notifying him formally, but it would be proper to notify him more or less informally as his goods were aboard the ship and the bills of lading were issued.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Re-cross.

Q. When you say there would be no necessity of notifying him, will you explain what you mean by that? A. Well, I can't see where it would be too interesting to him, in a formal manner. I can see in one way that he should be formally notified as a broker that his goods were not shipped, or that is, that his goods were being delayed on board this vessel when the fact was known to him.

Q. Was the fact known to him? A. It should be. I don't know whether it was or not, but it should be. I would also assume that it was made known to him through my office, and possibly through other sources. Nothing happens on the waterfront in cases like this that everybody in the business doesn't know something about it.

Q. When the strike situation permitted, this vessel was brought back to Westwego dock? A. As far as I know, yes. That was not ourselves or Isbrandtsen, however.

Q. Did you handle it from there on as agents? (693) A. After she was at the dock and turned back to Isbrandtsen, yes.

Q. In the same way? A. In the same way.

Q. In the meantime, it was turned over to Strachan for caretaking? A. Strachan Shipping Company as representatives of the holders of the vessel.

Q. For caretaking purposes? A. That's right.

Q. You know of no other vessel in Port in September, 1948, which was affected by any strike, do you? A. I don't know of any other vessel; no, sir.

Q. After this vessel came back to the Westwego Wharf in early December, was it (handing document to witness)? A. Well, I'd say, this is a pencilled copy. This is not our Port Log. I don't know who made this.

Q. What does your file show when it came back? A. It shows December 9, 1830 hour, she redocked at Westwego.

Q. After that, was this vessel properly loaded and des-

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Re-cross.

patched at the earliest practicable time? A. You mean after December 9th?

Q. Yes. A. No, because this memorandum indicates it was not until December 13th that she resumed loading, which indicates (694) that apparently the owners, in my opinion, must have been doing something from the 9th to the 13th, I would say, in the way of getting up stream in the boilers and getting the ship back in shape.

Q. Caretaking? A. That is my opinion. I don't know that; I would assume it.

Q. After it got back under your control was it loaded and despatched as soon as practicable? A. I would say so; yes. As a matter of fact, we appear here to have resumed loading on December 13th and she sailed at 6:15 the morning of the 19th.

* * * * * * * * *

Q. I believe you had the days of the week in mind this morning. I believe you said that September 3rd was Friday? A. That would be shown on this Port Log over here. The days of the week are shown on that log as far as it goes.

Q. Will you look at it and see if you can tell what day of the month Saturday would be? A. Saturday, according to this log, is September 4th.

(695) Q. Mr. Dalton, there is nothing unusual about overtime in connection with the loading of ocean going vessels, is there? A. I would say in these days of high expenses it is more usual than unusual; high expenses of ship operating, that is.

Q. And to the extent that it saves time of the ship, it is not a net loss; the extra expenses? A. Sometimes it is a net gain. It is a gain occassionally for the operator, depending on how much money he spends for overtime as against what the ship is costing him for what he is paying for the ship.

Plaintiffs' Exhibit 4 (In Part).
John Hansen Dalton—For Plaintiffs—Re-cross.

Q. Mr. Dalton, you are satisfied that your firm, Hansen & Tidemann, did everything possible within its power to load and despatch this ship at the earliest possible time?

Mr. Dunn: Objected to as to form.

A. Definitely.

Mr. Scott:

Q. So far as you are able to tell us of your own knowledge, any delay was solely from strike, work stoppages, or other labor difficulties? A. I wouldn't—

Q. So far as you are able to tell us from any knowledge that you have? (696) A. I wouldn't specify any delay because that could be any period of time, but the major delay was caused by the work stoppage or strike, or whatever you want to call it.

Mr. Tillinghast:

Q. Would you confine that period that you responded to Mr. Scott's question to the time the crew walked off the "Hawaiian" until loading recommenced? A. All of that cost was beyond our control.

Q. That is the period you have in mind? A. Yes.

Mr. Scott:

Q. That is the period that I intended to ask you about? A. All of that delay was beyond our control whatsoever.

Q. You are speaking now from the time the strike started, on September 3, 1949, until the strike was over, the vessel came back to the Westwego Wharf and was put in shape and turned over to you for reloading? A. That is right.

Plaintiffs' Exhibit 4 (In Part).
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

Q. That was caused solely by the strike, the labor stoppage, or labor difficulties; whatever they were? A. Yes, sir.

* * * * * * * *

(697) REDIRECT EXAMINATION

Mr. Dunn:

* * * * * * * *

(698) Q. These particular bills of lading, you say, were issued on September 3rd, after the caustic soda covered by them was all loaded aboard? A. That is definite.

Q. And that was after loading ceased, of the vessel? A. That, I wouldn't know. Do you mean when, the exact moment of the day that the bills of lading were issued?

Q. Yes. A. I have no record. We never keep a record of that. It could have been at 8:00 or 9:00 o'clock in the morning. It could have been later. I would not have a record. I would like to say, however, in any case, whatever time of the day it would be I don't see how I could have refused to issue these bills of lading.

* * * * * * * *

Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

ISBRANDTSEN LINES
World Wide Carriers of Freight

(Emblem)

26 Broadway
New York 4, U. S. A.

Tel. HAnover 2-3500

Cable Address: "ISBRANDTSEN"

RECEIVED from the Shipper hereinafter named, the goods or packages said to contain goods hereinafter mentioned, in apparent good order and condition, unless otherwise indicated in this bill of lading, to be transported subject to all the terms of this bill of lading with liberty to pro-

Plaintiffs' Exhibit 4 (In Part).
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

ceed via any port or ports within the scope of the voyage described herein, to the port of discharge or so near thereunto as the ship can always safely get and leave, always afloat at all stages and conditions of water and weather, and there to be delivered or transshipped on payment of the charges thereon. If the goods in whole or in part are shut out from the ship named herein for any cause, the Carrier shall have liberty to forward them under the terms of this bill of lading on the next available ship.

It is agreed that the custody and carriage of the goods are subject to the following terms on the face and back hereof which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the Carrier, Master and ship in every contingency, wheresoever and whensoever occurring, and also in the event of deviation, or of unseaworthiness of the ship at the time of loading or inception of the voyage or subsequently, and none of the terms of this bill of lading shall be deemed to have been waived by the Carrier unless by express waiver signed by a duly authorized agent of the Carrier:

ON BOARD

Ship: S/S HAWAIIAN. Voyage No. .....

Port of Loading: NEW ORLEANS, LOUISIANA.

Shipper: THE COLORADO FUEL & IRON CORPORATION. ON BOARD. B/L No. 144 1948.

Consignee: Order of THE NATIONAL CITY BANK OF NEW YORK, NEW YORK CITY, N. Y. or assigns.....

If consigned to Shipper's Order arrival notice to be addressed to .....

.....

(Without liability to carrier, see Clause 12 hereof)

Plaintiffs' Exhibit 4 (In Part).
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

Port of Discharge from Ship: BOMBAY, INDIA.

.....

(If goods to be transshipped at port of discharge):

Destination of Goods: .....

.....

(See Clause 11 hereof):

THE SCOPE OF THE VOYAGE IS DESCRIBED IN CLAUSE 3 HEREOF

PARTICULARS FURNISHED BY SHIPPER OF GOODS

Marks and Numbers	Quantity or Number of Pieces or Packages	Description of Goods	Gross Weight Pounds	Gross Weight Kilos	Measurement
MULKRAJ LUCKNOW VIA BOMBAY NOS. 1/3217 MADE IN USA	3,217	DRUMS CAUSTIC SODA 76% SOLID (N.Y. & L.) FREIGHT PREPAID REFERENCE: CP-136-A CONTRACT: #25 EXPORT DECLARATION #29555 IMPORT LICENSE: 416/48 9380/48	2294096#	1040595	
EX CARS: NP-20157 ACI-57292 RDG-105145 RI-147443 PA-101516 DRGW-67848 ATSF-8807 TNO-54912 TNO-54-988 NW-46060 NYC-121194 ATSF-145560 UP-187374 PENN-76053 CRP-22857 CBQ-35306 MILW-23045 NP-26993 WP-20437 RDG-106533 CRP-22877 PENN-65703 CO-9062 CNW-84234 EJE-60843 NKP-22110 IC-17421		FREIGHT PREPAID			

Plaintiffs' Exhibit 4 (In Part).
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

2294096# @ 21.50 per 2240 lbs. $22,019.23

FREIGHT TO BE PREPAID $22,019.23

IN ACCEPTING THIS BILL OF LADING the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed, or stamped on the front or back hereof, any local customs or privileges to the contrary nothwithstanding.

IN WITNESS WHEREOF, the Master of the said ship has affirmed to THREE bills of lading, all of this tenor and date, ONE of which being accomplished, the others to stand void.

Dated at NEW ORLEANS, LA., SEP—3 1948.

For the Master

ISBRANDTSEN COMPANY, INC.
As Agents for the Master

By HANSEN & TIDEMANN, INC.
Per Pro: J. H. DALTON

Terms of Bill of Lading continued on back hereof

1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (except as may be otherwise specifically provided herein) shall govern before the goods

Plaintiffs' Exhibit 4 (In Part).
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or misdelivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier. If this bill of lading is issued in a locality where there is in force a Carriage of Goods by Sea Act or Ordinance or Statute of a similar nature to the International Convention for the Unification of Certain Rules Relating to Bills of Lading at Brussels of August 25, 1924, it is subject to the provisions stated in such Act, Ordinance and rules thereto annexed which may be in effect where this bill of lading is issued.

(a) The Carrier shall be entitled to the full benefit of, and right to, all limitations of, or exemptions from, liability authorized by any provisions of Sections 4281 to 4286 of the Revised Statutes of the United States and amendments thereto and of any other provisions of the laws of the United States or of any other country whose laws shall apply.

* * * * * * * *

2. In this bill of lading the word "ship" shall include any substituted vessel, and any craft, lighter or other means of conveyance owned, chartered or operated by the Carrier used in the performance of this contract; the word "Carrier" shall include the ship, her owner, master, operator, demise charterer, and if bound hereby the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee; the word "shipper" shall include the person named as such in this bill of lading and the person for whose account the goods are shipped; the word "con-

Plaintiffs' Exhibit 4 (In Part).
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1:

signee" shall include the holder of the bill of lading, properly endorsed, and the receiver and the owner of the goods; the word "charges" shall include freight and all expenses and money obligations incurred and payable by the goods, shipper, consignee, or any of them.

3. The scope of voyage herein contracted for shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the ship may sail beyond the port of discharge or in a direction contrary thereto or return to the original port, or depart from the direct or customary route, and includes all canals, straits and other waters. The ship may call at any port for the purposes of the current voyage or of a prior or subsequent voyage. The ship may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may for matters occurring before loading the goods, known or unknown at the time of such loading and matters occurring after such loading, either with or without the goods or passengers on board, and before or after proceeding toward the port of discharge, adjust compasses, dry dock, with or without cargo aboard go on ways or to repair yards, shift berths, make trial trips or tests, take fuel or stores, remain in port, sail with or without pilots, tow and be towed, and save or attempt to save life or property; and all of the foregoing are included in the contract voyage.

. . . . . .

12. The port authorities are hereby authorized to grant a general order for discharging immediately upon arrival of the ship and the Carrier without giving notice either of

Plaintiffs' Exhibit 4 (In Part).
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

arrival or discharge, may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the Carrier may select, and continuously Sundays and holidays included, at all such hours by day or by night as the Carrier may determine no matter what the state of the weather or custom of the port may be. The Carrier shall not be liable in any respect whatsoever if heat or refrigeration or special cooling facilities shall not be furnished during loading or discharge or any part of the time that the goods are upon the wharf, craft, or other loading or discharging place. All lighterage and use of craft in discharging shall be at the risk and expense of the goods. Landing and delivery charges and pier dues shall be at the expense of the goods unless included in the freight herein provided for. If the goods are not taken away by the consignee by the expiration of the next working day after the goods are at his disposal, the goods may at Carrier's option and subject to Carrier's lien, be sent to store or warehouse or be permitted to lie where landed, but always at the expense and risk of the goods. The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. The Carrier shall not be required to give any notification of disposition of the goods.

* * * * * * * *

17. * * *

Whenever the value of the goods is less than $500 per package or other freight unit, their value in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less.

Plaintiffs' Exhibit 4 (In Part)
Exhibit F to Dalton Deposition and Schedule AO to Plaintiffs' Exhibit 1.

18. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery. The Carrier shall not be liable upon any claim for loss or damage unless written particulars of such claim shall be received by the Carrier within thirty days after receipt of the notice herein provided for.

19. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.

. . . . . .

21. This Bill of Lading shall be construed and the rights of the parties thereunder determined according to the law of the United States.

. . . . . .

---

26. SPECIFIED DOCK DISCHARGE: If the carrier makes a special agreement, whether by stamp hereon or otherwise, to deliver the goods hereby receipted for at a specified dock or wharf at the port of discharge, it is mutually agreed that such agreement shall be construed to mean that the Carrier is to make such delivery only if, in the

Plaintiffs' Exhibit 4 (In Part)
Exhibit H to Dalton Deposition and Schedule AS to Plaintiffs' Exhibit 1.

sole judgment of the Master, the ship can safely under her own power, proceed to, lie at, and return from said dock or wharf, always afloat at any time of tide, and only if such dock or wharf is available to the ship immediately the ship is ready to discharge the goods and, that otherwise, the ship shall discharge the goods in accordance with Clause 12 of this bill of lading, whereupon Carrier's responsibility shall cease.

27. All agreements or freight engagements for the shipment of the goods are superseded by this bill of lading, and all its terms, whether written, typed, stamped, or printed, are accepted and agreed by the shipper to be binding as fully as if signed by the shipper, any local customs or privileges to the contrary notwithstanding. Nothing in this bill of lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from or limitation of liability. If required by the Carrier, one signed bill of lading duly endorsed must be surrendered to the agent of the ship at the port of discharge in exchange for delivery order.

Exhibit H to Dalton Deposition and Schedule AS to Plaintiffs' Exhibit 1.

• • • • • • • •

ON BOARD

Ship: S/S HAWAIIAN. Voyage No. .....

Port of Loading: NEW ORLEANS, LOUISIANA.

Shipper: THE COLORADO FUEL & IRON CORPORATION. ON BOARD. B/L No. 45 1948.

Consignee: Order of THE NATIONAL CITY BANK OF NEW YORK, NEW YORK CITY, N. Y. or assigns. .....

If consigned to Shipper's Order arrival notice to be addressed to .....

Plaintiffs' Exhibit 4 (In Part)
Exhibit H to Dalton Deposition and Schedule AS to Plaintiffs' Exhibit 1.

.....

(Without liability to carrier; see Clause 12 hereof)

Port of Discharge from Ship: BOMBAY, INDIA.

.....

(If goods to be transshipped at port of discharge):

Destination of Goods: .....

.....

(See Clause 11 hereof):

THE SCOPE OF THE VOYAGE IS DESCRIBED IN CLAUSE 3 HEREOF

PARTICULARS FURNISHED BY SHIPPER OF GOODS

Marks and Numbers	Quantity or Number of Pieces or Packages	Description of Goods	Gross Weight Pounds	Gross Weight Kilos	Measurement
MULKRAJ LUCKNOW VIA BOMBAY NOS. 3218/4799	1,582	DRUMS CAUSTIC SODA 76% SOLID (N.Y. & L.)	1128282#	511785	
		FREIGHT PREPAID			
		REFERENCE: CONTRACT: 25 IMPORT LICENSE 416/48 9380/48			
EX CARS: NW-43896 NYC-161752 DLW-51503 MILW-716875 IHB-10296 NYC-175844 PENN-105144 ITC-6499 NH-33292 NP-26590 PM-82979 PENN-78106 G..-31427 LN-15134					

FREIGHT PREPAID

FARRELL SHIPPING CO. INC. (BROKERS) EJA

Plaintiffs' Exhibit 4 (In Part)
Exhibit H to Dalton Deposition and Schedule AS to Plaintiffs' Exhibit 1.

1128282# @ 21.50 per 2240 lbs $10829.49

FREIGHT TO BE PREPAID $10829.49

IN ACCEPTING THIS BILL OF LADING the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed, or stamped on the front or back hereof, any local customs or privileges to the contrary nothwithstanding.

IN WITNESS WHEREOF, the Master of the said ship has affirmed to 3 bills of lading, all of this tenor and date, ONE of which being accomplished, the others to stand void.

Dated at NEW ORLEANS, LA., SEP—3 1948

For the Master

ISBRANDTSEN COMPANY, INC.
As Agents for the Master

By HANSEN & TIDEMANN, INC.
Per Pro: J. H. DALTON

The stipulations, exceptions and conditions, appearing on this Bill of Lading are identical with those printed supra as part of B/L No. 144.

Plaintiffs' Exhibit 5 (In Part).

(Kacocha Deposition)

(3) CHARLES A. KACOCHA, called as a witness on behalf of the defendant American-Hawaiian Steamship Company, being first duly sworn by the Notary Public, testified as follows:

Direct Examination by Mr. Tillinghast:

Q. What is your full name, Captain? A. Charles Albert Kacocha.

Q. Where do you reside? A. 776—18th Avenue, San Francisco, California.

Q. Are you a seafaring man? A. Yes, sir.

* * * * * * * *

Q. By whom were you employed in 1948? A. American-Hawaiian Steamship Company.

Q. Are you still employed by the American-Hawaiian Steamship Company? A. Yes, sir.

Q. How long have you been employed by the American-
(4) Hawaiian Steamship Company? A. Since 1930.

Q. During 1948 were you attached to one of the vessels of your employer? A. Yes, sir.

Q. What vessel was it? A. Master of the "S/S Hawaiian".

Q. And as master you were in command of that ship, is that correct? A. That's right.

Q. Prior to August, 1948, will you describe the employment of the vessel? A. The voyage just before August was to South Africa on a charter for the Farrell Lines.

Q. When did that voyage terminate and where, Captain? A. At New York some time in July, I believe, 1948.

Q. Is July your best recollection? A. Yes, sir.

Plaintiffs' Exhibit 5 (In Part).
Charles A. Kacocha—For Defendant, American-Hawaiian Steamship Company—Direct.

Q. Did you contemplate operating the ship again after the ship was at New York in July, 1948? A. Yes, sir, I believe so.

Q. Did you have anything to do with her future employment at that time? A. I did, but at the close of that voyage I had requested leave for one voyage to get some very necessary dental work done.

Q. Did you have any reason to believe that the ship would not be able to engage in that prospective (5) employment after July? A. No, sir.

Q. Did you have any difficulties with your officers or crew? A. None.

Q. Were you advised by anyone on board that there was a possibility that the crew or the officers might go on strike? A. No, not at that time, no, sir.

Q. At any time? A. No. We had during the course of the Farrell Line voyage heard something about labor disturbance on the Pacific Coast. It had every indication of being on the verge of settlement or would be settled.

We were used to hearing talk of that sort frequently in the past years.

Q. In other words, that type of situation was not unusual? A. No, sir.

Q. You have stated that you laid off for a voyage in order to have some dental work done, isn't that correct? A. Yes, sir.

Q. Did you thereafter rejoin your ship? A. I did, yes, sir.

Q. When did you rejoin it? A. About the 8th or 9th of December.

Q. 1948? A. 1948.

Q. Where was the ship? A. At New Orleans.

Plaintiffs' Exhibit 5 (In Part).
Charles A. Kacocha—For Defendant, American-Hawaiian Steamship Company—Direct.

Q. Was she at a dock or was she at anchor? (6) A. I rejoined her in the stream.

Q. Before she went to the dock? A. Before she went to the dock.

Q. And you resumed your capacity as master, is that true? A. Yes, sir.

Q. Do you recall what occurred after you rejoined your vessel at New Orleans? A. When I rejoined her preparations were under way to get up steam.

Q. Do you know if this is the first time since the strike that the vessel had steam up? A. I feel pretty sure it was, yes, sir.

Q. Then what happened after you got up the steam on the vessel? A. And then arrangements were made by the agents at New Orleans for us to return to the dock and resume cargo loading operations.

Q. Do you remember the names of those agents, please? A. Yes, sir, Hansen & Tidemann.

* * * * * * * * *

(7) * * * Q. Would you describe what transpired after you docked at New Orleans at this time, to the best of your recollection, Captain? A. We resumed cargo loading operations which meant reloading all vehicles that had been pushed inside the shed out of the way which were not loaded when the strike took place.

The seamen's strike delayed this cargo loading.

* * * * * * * * *

(10) * * * Q. What day did you sail from New Orleans, Caption? A. I would have to look in the log book for

Plaintiffs' Exhibit 5 (In Part).

Charles A. Kacocha--For Defendant, American-Hawaiian Steamship Company—Direct.

that. I think it was the same morning the cargo was completed here.

Q. Would you be kind enough to refer to the log, Captain? A. Yes, sir, she sailed at 6:33—departure, 6:33, December 19th.

Q. 1948? A. 1948.

Q. What are you referring to, Captain, for your source of information? A. The smooth deck log.

Q. Is that log kept in the ordinary course of ship's business? A. Yes, sir, it is.

Q. And does it record events as they transpire? A. Yes, sir.

Q. Is it customary to keep a log book on the ship? A. Yes.

Q. Did you sign those pages? A. Yes, sir, I did.

Mr. Tillinghast: I ask that the log book be marked for identification.

(Log book above referred to was marked Defendant American-Hawaiian Steamship Company Exhibit A for identification, July 17, 1953, I.H.S.)

(11) Q. To what port was the caustic soda we have been discussing destined? A. It was for Bombay.

. . . . . .

Plaintiffs' Exhibit 5 (In Part).

Charles A. Kacocha—For Defendant, American-Hawaiian Steamship Company—Direct.

(18) * * * Q. Can you state what date you arrived at Bombay, Captain? A. No, sir. I would have to look in the log book. It seems to me it was the latter part of February or the early part of March, but I would rather consult the log book.

Q. Do that, please. A. (Referring to log book) According to the log book, we arrived at Bombay, off Bombay Light Vessel, 6:15 A. M., February 25, 1949.

Q. Did you dock, Captain, at Bombay? A. We docked at Bombay, yes, sir.

Q. On what date? A. We docked at Bombay on February 28th, 11:20 A. M.

Q. Had you discharged any cargo when you were at anchorage, Captain? A. No, sir.

Q. Did you discharge all your Bombay cargo at that wharf? A. At the dock. While at anchor we were awaiting a berth. The harbor was very crowded and (19) ships had to wait their turn.

Q. You berthed as soon as you were notified? A. Yes, sir.

Q. Making reference to Isbrandtsen Exhibit A for identification, would you be kind enough to tell us whether the caustic soda which was discharged, was discharged at Bombay? A. Yes, it was.

Q. Do you recall seeing that cargo in stow before she was discharged? A. I saw some of it, yes, sir.

Q. What was its condition, if you recall? A. My recollection of it is it was very good. In fact, some of the people commented that because it had been in the ship for quite awhile they expected that some of the drums may have been eaten away from the contents, which was not so.

Plaintiffs' Exhibit 5 (In Part).

Charles A. Kacocha—For Defendant, American-Hawaiian Steamship Company—Direct.

My recollection of the caustic soda was that it was in good shape. I didn't see it all, however.

Q. Were you on the ship most of the time the vessel was in Bombay? A. I was on board nearly all of every day.

* * * * * * * *

(20) Q. When did you finish discharging, Captain? A. All Bombay cargo was out of the vessel at 8:30 P. M., March 12, 1949.

* * * * * * * *

Log of the S. S. Hawaiian Voy. 6 1/4 Date Sept 2 1940 From 4th Wharf 3 Towards Westwego La.

HOUR	KNOTS	COURSES	WINDS	SEA	BAR.	THERMOMETER AIR WET	THERMOMETER AIR DRY	THERMOMETER WATER	LOOKOUTS	RUNNING LIGHTS WHEN LIGHTED	RUNNING LIGHTS WHEN EXT.	WATCH OFFICER	REMARKS
A.M. 1													Mate Wiate & H Purdy on duty. No cargo worked during night. Frequent inspection made about ships
2													
3												0700	Stevedores resume loading #1-2-4-5 holds.
4			Sly 2		2996	71	73					0800	F.H. Purdy, mate on, relieved by ships officer
5												0730	Stevedores ceased loading & covered up all hatches due to rain.
6												8:00 AM	Stevedores resumed loading cargo 8:00 AM Stevedores K.O. work because of rain.
7													
8			Sly 2		2993	75	77		Draft 0800			9:30 AM	Rain stops Stevedores resume loading #1-2-4-5
9									F 13.11			11:05	Rain, stevedores cover up hatches & K.O.
10									A 21.09				
11									m 20.04				
12													
P.M. 1	11:50		Log Book sent ashore in care of Mrs L E. WRIGHT. American-Hawaiian Lawyer & Photostat log entries pertaining to injuries to Longshoremen Aug 27 1940 in Houston									1:00 PM	Four (4) gangs resume Loading #1-2-4-5 hatches.
2												*3:00 PM	All Stewards department left ships to attend union meeting & did not return to ships at any hour of this day
3												5:30 PM	T G Williams night mate on duty.
4												6:00 PM	Knock off all day gangs for supper.
5												6:00 PM	Shut (3) mate gangs resume loading #2,4,5 hatches Combo Basra cases, chassis in all Lower holds.
6	10:10		Log returned by W E Wright Sept 7/48.									10:30 PM	Finish #2 L/H stack "Bessie" in #2 L.T.D. (cases)
7									Draft 1500			12:00 M.N.	Knock off all gangs for supper
8									F 19.01			12:00 Mid.	J A Williams, mate watch relieved by F.H. Purdy. Day ends partly cloudy. Light Drizzle.
9									A 23.09				
10									m 21.05				
11													
12			SE2		2938	75	77						

COURSE AND DISTANCE	LAT. BY OBS.	LONG. BY OBS.	LAT. BY ACCT.	LONG. BY ACCT.	DIST. PER LOG	CURRENT	VARIATION	DEVIATION	BEARING AND DISTANCE AT NOON

J W Mann MASTER

MATE

19 48 From 4th Wharf 3 Towards Wellington Ka. (Page 137A - Sheet 2)

NING LIGHTS

N ED	WHEN EXT.	ATCH OFFICER	REMARKS
			Chief Mate J H Pendy on duty. No cargo worked during night. Frequent inspections made about ship
			0700 Stevedores resume loading #1-2-4-5 holds.
			0800 F.H. Pendy, relieved, relieved by ships officers
			0730 Stevedores ceased loading secured up all hatches due to rain.
			8.00 Am Stevedores resumed loading cargo. 8.00 Am Stevedores N.W.
			work because of rain.
			9.30 H Rain stops. Stevedores resume loading #1-2-4-5
			11.05 Rain, stevedores secure up hatches & N.W.

	1.00 Pm	Four (4) gangs resumed Loading #1-2-4-5 hatches.
	3.00 Pm	All Stewards department left ship to attend union meeting & did not return to ship at any hour of the day
	5.00 Pm	T G Williams night mate on duty.
	6.00 Pm	Knock off all day gangs for supper.
	6.30 Pm	Shut (3) mate gangs resume loading #2,4,5 hatches Loading Bales cases, chassis in all Lower holds.
	10.30 Pm	Finish #2 C/H start "Bess" in #2 L T D (Cases)
	12.00 mid	Knock off all gangs for supper
	12.00 mid.	J A Williams, mate mate relieved by F.H. Pendy. N.M. Day ends partly cloudy. Light Breeze.

CURRENT	VARIATION	DEVIATION	BEARING AND DISTANCE AT NOON

J W Mace MASTER

MATE

4

Log of the S. S. Hawaiian Voy. 6 Cw Date Sept 3 1948 From Wharf #3 Towards Wellington Ka. (P

HOUR	KNOTS	COURSES	WINDS	SEA	BAR.	THERMOMETER AIR WET	THERMOMETER AIR DRY	THERMOMETER WATER	LOCKOUTS	RUNNING LIGHTS WHEN LIGHTED	RUNNING LIGHTS WHEN EXT.	WATCH OFFICERS	REMARKS
A.M. 1													F.H. Hardy, night watch, on duty.
2												1st AM	Four (4) gangs rec'd loading "Bravo" in #1, 2, 4, 5 hatches
3													inspection made of vessel & found in good order
4			Dly 2		2987	73	76					3rd AM	Steward's department aboard. Discharged their personal g
5												3-5 AM	Stewards department ashore & definately on strike
6												6 AM	Stewardess N.O for breakfast - 6 AM light rain set
7												5th AM	Duty relieved by ships officers
8			NE 3		2986	72	74					8.25 AM	Four (4) gangs resumed loading #1, 2, 4 & 5 hatches
9												9th AM	Knocked off all gangs because of rain. Hatches covered & Ge
10	10 Sm	Vessel off hire this date. Fuel on Board 13,660 Bbls											by
11		and 95 tons of Water											
12	10.30 AM	Undermanned deck crew (complete) ashore. Unlicensed engine										10.30 AM	Vessel off hire - stopped loading cargo.
		crew except firemen ashore with baggage in sympathy										10.30 AM	Sailors & engine ships in sympathy with Steward Dept. re
P.M. 1		with Stewards Dept. and hereby declared desertion											men on engine room & deck crew left.
2	5.30 pm	Foreman cabin and baggage - declared desertion										12.30 AM	Twenty (20) men (long shore men) reporting ship
3	1st pm	Cutter mooring lines, put out Booms & hatches opened during										12.00 noon	Knock off for lunch.
4		morning.										1.30 pm	Twenty (20) men stood on loading perishables & Vegetable
5	2nd pm	Mr. Wright & Miss Williams of Tenebrieg Gyeong, aboard to take										4th PM	all perishables & vegetables off ships. stevedores away
6		statement of Master, Ch Eng. and Chief Officer. Cadet at 5 PM										5-30 pm	Plant shut down.
7													Heavy winds continuous - heavy rains, thunderstorms ev
8		5PM Draft											Hurricane approaching New Orleans.
9		F 29 06										12th Mid. P.M.	Storm Warning
10		A 24 04											all hatches battened down, lines doubled up & ships si
11		M 21 11											against hurricane.
12													

Gangway Watchmen.
4 PM to 10 PM W L MORRIS
10 PM to 12 M E J LIVANOAIS

COURSE AND DISTANCE	LAT. BY OBS.	LONG. BY OBS.	LAT. BY ACCT	LONG. BY ACCT.	DIST. PER LOG	CURRENT	VARIATION	DEVIATION	BEARING AND DISTANCE AT NOON

J. H. Marr MAST

8

RUNNING LIGHTS WHEN LIGHTED	RUNNING LIGHTS WHEN EXT.	WATCH OFFICER	REMARKS
			F. H. Purdy, night watch, on duty.
		1[00] A.m.	Four (4) gangs receiving loading "Beans" in #1, 2, 4, 5 hatches. Receiving compartments made of wood & found in good order
		3[00] A.m.	Steward's department aboard. Receiving their personal effects.
		3[45] A.m.	Stewards department ashore & definately on strike
		6[00] A.m.	Stewards N.O. for breakfast - 6 [00] A.m. light rain set in.
		5[30] A.m.	Purdy relieved by ships officers
		8[25] A.m.	Four (4) gangs receiving loading #1, 2, 4 & 5 hatches
bly		9[00] A.m.	Knock off all gangs because of rain. Hatches covered. Gangs standing by
engine		10[30] A.m.	Vessel off hire. Stopped loading cargo.
standby		1030 A.m.	Sailors leave ship in sympathy with Steward Dept. with Steward men in engine room leave & depart vessel.
		10 30 A.m.	Twenty (20) men (long shoremen) receiving ship
shoring		12[00] noon	Knock off for lunch.
		1[00] P.m.	Twenty (20) men start receiving perishable & Vegetable
s to take		4[00] P.m.	all perishables & vegetables off ships. ships going away
s P.m.		5[30] P.m.	Plant shut down.
			Day ends continuous heavy rains, hurricane winds, — Hurricane approaching New Orleans.
Sailors men		12[00] Mid. P.M.	Storm following
el.			all hatches battened down, lines doubled up & ships secured
ds			against hurricane.

LOG	CURRENT	VARIATION	DEVIATION	BEARING AND DISTANCE AT NOON

J. W. Mann MASTER

MATE

5.

Plaintiff's Exhibit 18 (In Part).

SMOOTH DECK LOG
(Sept. 1, 2 and 3, 1948; 3 Sheets)

(See opposite ☞)

* * * * * * * *

Note

Page 135a is in three sheets:

Sheet 1 is on Card 7;
Sheets 2 and 3 follow this exposure.

Defendant Isbrandtsen's Exhibit B.

ACTUAL SCHEDULE

S.S. HAWAIIAN, Voyage 1

Account No.	*Journal*	*Arrival Date*	*Port*	*Sailing Date*
			New York	8/19/48
3012	J 2 A/S 80 (1949)	8/27/48	Houston	8/29/48
2985	2 " 56 "	8/30/48	New Orleans	12/19/48
2838	3 " 70 "	12/21/48	Tampa	12/24/48
3148	3 " 109 "	1/23/49	Port Said	1/23/49
3733	8 " 79 "	2/ 5/49	Kummit	2/ 6/49
3470	6 " 87 "	2/11/49	Abadan	2/13/49
		2/13/49	Khorramshahr	2/14/49
3733	8 " 79 "	2/15/49	Basra	2/16/49
		2/19/49	Bahrein	2/20/49
3378	6 " 10 "	2/25/49	Bombay	3/13/49

Defendant Isbrandtsen's Exhibit H.

New Orleans, Louisiana
December 10, 1948

Messrs. Isbrandtsen S.S. Company
c/o Hansen & Tideman, Agents
Carondelet Building
New Orleans, Louisiana

Gentlemen:

S.S. HAWAIIAN

Confirming our various telephone conversations of yesterday, the above vessel is, in accordance with all terms and conditions of Charter Party, hereby retendered as ready in all respects to resume loading at TPEP, Westwego Docks, as of redocking time at Westwego, 6:30 PM, December 9, 1948.

Very truly yours,

AMERICAN-HAWAIIAN STEAMSHIP COMPANY
STRACHAN SHIPPING COMPANY, AGENTS
By W. A. KLEIN JR.

WAK:sg

Received:
For and on behalf of
Isbrandtsen S.S. Company
Date:
Time:

Hansen & Tideman, Agents

By:

Defendant Isbrandtsen's Exhibit I.

CERTIFICATE OF LOADING

No. A-17344

(See opposite ☞)

Defendant Isbrandtsen's Exhibit J.

CERTIFICATE OF LOADING COVERING SPECIFIC CARGO

(See opposite ☞)

No. S 2286

CERTIFICATE OF LOADING COVERING SPECIFIC CARGO

BUREAU OF INSPECTION

—OF—

The Board of Underwriters of New York

New Orleans, La., DECEMBER 29, 19 48

This is to Certify, *That in connection with the loading of the specific cargo hereinafter mentioned the* AM. S.S. "HAWAIIAN" *whereof* C. A. KACOCHA *is Master, of* 3835 *Net Tons Measurement, built at* PHILADELPHIA PA. *in* 1919, *bound for* PERSIAN GULF AND INDIA *has been under the inspection of the undersigned at this port from time to time during the course of the loading of the undermentioned cargo only; that the stowage of such cargo, so far as it came under the observation of the undersigned, was in accordance with the rules of* The Board of Underwriters of New York.

THIS CERTIFICATE IS NOT A CERTIFICATE OF SEAWORTHINESS AND RELATES ONLY TO THE FOLLOWING CARGO:

FWD. 576 DRUMS ETHYL COMPOUND

AFT. 424 DRUMS ETHYL COMPOUND

LASHED AND SHORED, CRIBBED TO THE SATISFACTION OF THE SURVEYOR.

UNDERDECK CERTIFICATE ISSUED: A-17344

Draft of water loaded, ft. in. *forward,* ft. in. *aft.* *Freeboard,* ft. in.

MEAN DRAFT ft. in.

J. C. Campbell *Surveyor.*

This Certificate is issued on the conditions that, while the Officers and Committee of the Board use their endeavors to insure that the functions of the Board are properly executed, neither such Officers nor such Committee, nor the Board are under any circumstances whatsoever to be held responsible for any inaccuracy in any report or certificate issued by the Board or its surveyors, or for any omission, default, or negligence of the surveyors or other employees or representatives of the Board

Note

Page 139a is on
Card 7

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FILED
AUG 20 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 391

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS AND BADHWAR,

Plaintiffs-Petitioners,

against

THE COLORADO FUEL AND IRON CORPORATION,

Defendant-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

DUNN & ZUCKERMAN,
Attorneys for Petitioners,
1475 Broadway,
New York, N. Y.

Index.

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	5
Statement	5
Reasons Why the Writ Should be Granted	12
A. An Important Question of Federal Law Remains to be Settled	12
B. Conflicts Between the Second Circuit on the One Hand and the United States Supreme Court and the New York Court of Appeals on the Other	14
1. Basic Contract Law	14
2. Application to the Law of Shipment	16
3. Conflict With the New York Law of Good Faith	18
C. The Second Circuit's Interpretation of a Federal Statute Should be Reviewed	19
D. The Status of a Freight Forwarder and the Nature of His Trade Practices Require Review	20
E. The Issues Herein are of Primary Importance to Domestic Commerce and International Trade	21
Conclusion	21
Appendix A	23
Appendix B	32
Appendix C	34

TABLE OF CASES CITED.

	Page
Application of Reinhardt, Surr. Ct., Kings Co., 202 Misc. 424, 114 N. Y. S. 2d 208	19
Armour Grain Co. v. Compagnie G ierale Transatlantique, S. D. N. Y., 26 F. (2d, 739, aff'd 26 F. 2d 741	18
Canadian Industrial Alcohol Co. v. Dunbar Molasses Co., 253 N. Y. 194, 179 N. E. 383	14, 15
Carnegie Steel Co. v. U. S., 240 U. S. 156, 165, 36 S. Ct. 342, 60 L. Ed. 576	14
Commercial Union v. Anglo-South Amer. Bank Ltd., 2nd Cir., 16 F. 2d 979	18
Companhia De Navigacao Lloyd Brasileiro v. C. G. Blake Co., 2nd Cir., 34 F. 2d 616	13, 17
Connell Bass Co. v. Diedericksen & Co., 9th Cir., 213 Fed. 737	18
Day v. U. S., 245 U. S. 159, 38 S. Ct. 57, 62 L. Ed. 219	14, 15
Eppens v. Littlejohn, 164 N. Y. 187	16
Farlou Realty Corp. v. Woodsam Associates, Inc., 49 N. Y. Supp. 367, aff'd 268 App. Div. 975, 52 N. Y. S. 2d 575, aff'd 294 N. Y. 846, 62 N. E. 2d 396	15
Fidelity & Deposit Co. v. Queens County Trust Co., 226 N. Y. 225, rvrsg. 174 App. Div. 160, 159 N. Y. Supp. 954; rearg. den., 226 N. Y. 711	19
Kramer v. Joseph P. Day, Inc., 26 N. Y. S. 2d 734	19
Kramer v. Uchitelle, Inc., 288 N. C. 467, 472, 43 N. E. 2d 493, 495, 141 A. L. R. 1497	15

Page

Lamborn v. Log Cabin Products Co., D. C. Minn., 291 Fed. 435 18
Ledon v. Havemeyer, 121 N. Y. 179, 24 N. E. 297 16
L. N. Jackson & Co., Inc., v. Royal Norwegian Government, 2nd Cir., 172 F. (2d) 694 ..... 17, 20

Madereinse Do Brasil S/A v. Stulman-Emrick Lumber Co., 2nd Cir., 147 F. 2d 399, cert. den. 325 U. S. 861, 65 S. Ct. 1201, 89 L. Ed. 1982 17
Miller v. Harvey, 221 N. Y. 54 16

Normandie Shirt Co., Inc., v. J. H. & C. K. Eagle, 238 N. Y. 218, 144 N. E. 507 12
Northern Pacific Ry. Co. v. American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269 .... 14, 15

Ocean S. S. Co., Ltd., v. U. S. Steel Products Co., 2nd Cir., 293 Fed. 823, cert. den. 244 U. S. 652 19
Olivier Straw Goods Corp. v. Osaka Shosen Kaisha, 2nd Cir., 1928, 27 F. 2d 129 19
119 5th Avenue, Inc., v. Taiyo Trading Co., Inc., Supreme Court, N. Y. County, June 24, 1947, 73 N. Y. Supp. 2nd 774, 776 15

Raner v. Goldberg, 244 N. Y. 438, 155 N. E. 734 15
Reynolds v. Commerce Fire Ins. Co., 47 N. Y. 597 19
Robitzek Investing Co., Inc., v. Colonial Beacon Oil Co., 265 App. Div. 749, 753, 40 N. Y. S. 2d 819, 822; Id., 291 N. Y. 831, 50 N. E. 2d 555 15

Skinner v. Norman, 165 N. Y. 565 19
State Street Trust Co. v. Ernst, 278 N. Y. 104 19
Sun Printing Co. v. Moore, 183 U. S. 642, 22 S. Ct. 240, 46 L. Ed. 366 14

Page

The Harriman, 76 U. S. 161, 173; 19 L. Ed. 629 ..... 14, 16
The T. J. Hooper, 2nd Cir., 60 F. 2nd 737 21
Tobias v. Lissberger, 105 N. Y. 404, 12 N. E. 13 .... 16, 18

William C. Atwater & Co., Inc., v. Panama R. Co., 255 N. Y. 496, 175 N. E. 189 ..... 12, 13

MISCELLANEOUS.

Restatement, Contracts, §§288, 458 15
Williston on Contracts, Rev. Ed. §§1938, 1939, 1955.... 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No.

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, Ltd., composing the co-partnership doing business under the firm name and style of Mulkraj Brothers and Badhwar,

Plaintiffs-Petitioners,

against

THE COLORADO FUEL AND IRON CORPORATION,

Defendant-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review that part of a judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on May 29, 1957, which affirmed that part of a decision of the United States District Court for the Southern District of New York dismissing on the merits petitioners' action against The Colorado Fuel and Iron Corporation, respondent.

Citations to Opinions Below.

The opinion of the District Court (4a-41a)[1] is reported at 138 Fed Supp. 595. In the Court of Appeals for the Second Circuit, the opinion of the Court was written by Chief Judge Charles E. Clark for himself and Judge J. Edward Lumbard, and a dissenting opinion was written by Judge Learned Hand, who voted to reverse the judgment of the District Court and to remand to ascertain damages. Said opinions are printed as Appendix A. (*Infra*, p. 23.)

Jurisdiction.

The judgment of the United States Court of Appeals was dated and entered on May 29, 1957, and is printed as Appendix B. (*Infra*, p. 32.) The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

Questions Presented.

1. The majority opinion of the Court of Appeals begins with the following statement:

> "This appeal presents interesting issues concerning the duty of an American seller under a C. I. F. contract to select a suitable ship to carry goods to a foreign buyer on the eve of an impending strike." (P. 24, *infra*.)

(a) What is the effect (upon such seller's duty to select a suitable ship) of a national emergency 80-day injunction against a general maritime strike? During such injunction period may such seller contract with a buyer in India to sell and ship him goods without disclosing to him the strike threat to performance of the contract, or re-

[1] Figures in parentheses refer to pages of the printed Appendix to Plaintiffs-Appellants' Brief in the United States Court of Appeals.

vealing the tentative shipping arrangements with the ocean carrier, or bargaining for and obtaining an exculpatory clause in the contract, and nevertheless escape liability for delay caused by the strike?

(b) Where the seller has made a contract of affreightment with a carrier during such strike injunction period and *prior* to seeking out and contracting with the foreign buyer to sell and ship him the goods, and fails to disclose to the buyer the terms or infirmities of such contract of affreightment, can the latter contract be deemed to have been made "on behalf of the buyer" as required by the Uniform Sales Act, so as to bind the buyer to its infirmities?

(c) May such seller modify such contract of affreightment, without notice to the foreign buyer, so as to accept a ship subject to immobilization by such strike, and scheduled to sail after the expiration of the strike injunction, and may he proceed to load the goods thereon, despite the foreseeable risk of delay in movement thereof, without assuming such risk?

2. (a) Whether such seller, having unilaterally elected "to take a chance that the (vessel) would not be struck or would be struck briefly" (majority opinion, p. 28, *infra*), although the duration of the strike could not be foretold by anyone, is relieved of his gamble when the strike continues far beyond the seller's final dates for proper shipment under the contract.

(b) Whether such majority holding, over the vigorous dissent of Judge Hand, conflicts with a basic principle of contract law with respect to foreseeable risks, long settled in this Supreme Court and in the Court of Appeals of the State of New York, and followed by the Court of Appeals for the Second Circuit in its previous decisions.

3. Where a contract specifies shipment of goods, part by September 22nd and part by October 10th, may a Court alter such terms by its own purely speculative assumption that the buyer "would accept an October 11th sailing if necessary" (p. 28, *infra*), for *all* of the goods? Does not this holding exceed the lower Court's competency as defined by this Court and does it not dangerously unsettle basic contract law in New York and elsewhere?

4. (a) Has the Court below, in dealing with the question of fraudulent negotiation of bills of lading, negated the New York law of "good faith" in the performance of contracts and disturbed such law in other states?

(b) Has it likewise rendered ineffectual 49 U. S. C., Section 114 (c), which states that one negotiating a bill of lading warrants "that he has knowledge of no fact which would impair the validity or worth of the bill"?

5. Whether a freight forwarder is an independent contractor to whom a seller can delegate his duty of shipment without further responsibility to a buyer and achieve isolation from facts known to the freight forwarder. Whether he achieves the same result by delegating only the duty of obtaining a bill of lading.

6. Whether a freight forwarder deputed to select a ship may leave its selection all together to an interested carrier, or whether that constitutes, as Judge Hand declares, "an irresponsible subinfeudation of authority" (p. 31, *infra*).

7. Whether the Court below has dignified local trade practices with a dangerously binding and conclusive effect that would preclude Courts from inquiring as to their adequacy, scope, necessity, freedom from negligence and familiarity to foreign buyers.

Statutes Involved.

The statutes involved are the Labor Management Relations Act of 1947, §§ 209, 210, 61 Stat. §§ 155, 156, 29 U. S. C., §§ 179, 180; the United States Carriage of Goods by Sea Act, April 16, 1936, C. 229, § 4, 49 Stat. 1210, 46 U. S. C., § 1304 (2) (j); the Act of August 29, 1916, C. 415 (Bills of Lading) § 34, 39 Stat. § 543, 49 U. S. C., § 114, (a), (b), (c); and the New York Personal Property Law, §§ 127 and 100 (5), which are identical with the Uniform Sales Act, §§ 46 and 19 (5), 1 Uniform Laws Annotated. These statutes are printed in Appendix C (p. 34, *infra*).

Statement.

The action is for substantial money damages sustained by a buyer of caustic soda chiefly through market decline, due to the failure of the seller, the defendant-respondent, to make proper and timely shipment thereof. The soda arrived in Bombay some six months after its loading aboard the S. S. *Hawaiian* at New Orleans. Plaintiffs-appellants are citizens and residents of Lucknow, India. The defendant-respondent, The Colorado Fuel and Iron Corporation, is a corporation organized in Colorado. In the lower courts, two other defendants were included, against whom no writ is sought, namely American-Hawaiian Steamship Company, owner of the S. S. *Hawaiian*, an Isbrandtsen Company, Inc., charterer thereof. The District Court found complete diversity and jurisdiction under 28 U. S. C. 1332 (a) (2).

The delay complained of, which gave rise to plaintiffs' damages, resulted from a strike of the unionized crew of the S. S. *Hawaiian*, which interrupted her loading and immobilized her for more than three months. It was not a localized strike, a "wildcat" strike, nor

at all sudden, but was announced long before Colorado initiated negotiations for a sales contract with plaintiffs, and went into effect on schedule when the statutory injunction against it expired. As the District Court opinion states (10a):

> "On June 14th, 1948, a threatened maritime strike on the East, Gulf and West coasts was temporarily restrained, and subsequently enjoined for a full eighty-day period expiring September 2nd, 1948. Orders were made by this Court and the United States District Court for the Northern District of California pursuant to the 'national emergency' provisions of the Labor Management Relations Act of 1947. Separate actions were filed on behalf of the United States against various maritime unions and ship operators, including Isbrandtsen and American-Hawaiian. * * *"

On July 29, 1948, or 46 days after the strike injunction commenced running, Colorado entered into an affreightment contract, or "booking," with Isbrandtsen, calling for the carriage of 1,000 tons of caustic soda from New Orleans to Bombay on the S. S. *Jane G. Swisshelm* or other A-1 vessel. Shipside delivery was to be made between August 19 and 25, as required by Isbrandtsen's agents. The scheduled sailing date of the vessel was August 28-30 (C. A. Op., p. 25, *infra* [Col. Appx., 51a]).

Thereafter, early in August, 1948, Colorado urgently requested the National City Bank of New York to find a buyer in India for its caustic soda (42a, 45a), and the bank found plaintiffs, who agreed to take 2,000 tons at a flat price of 9 1/2 cents per pound, C.I.F. Bombay, giving no consideration to an F.A.S. alternative offer.[2]

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[2] Most of the relevant cables and correspondence are reproduced or summarized in the District Court Opinion (5a-9a), but a few not fully, which latter are printed in the Appendix to Plaintiffs-Appellants' Brief (42a-50a).

Colorado had first ascertained from the bank that the market trend was downward and speculative elements in India were selling (42a, 45a). New York law was applied to the construction of the contract by agreement of the parties (5a).

With respect to shipment, Colorado represented, by cable of August 6, 1948, that it had shipping space for a minimum of 500 tons of caustic soda "from New Orleans" on or about August 22, 1948, and undertook to arrange shipment of the balance "from a Gulf Port" by September 20, 1948 (6a, 7a). It further represented, by cable of August 10, 1948, that it had an "option on boat space expiring Friday" August 13, 1948—a non-existent option, unexplained at the trial (Pl. Exh. 1, Sched. P., 46a). It further stated, by cable of August 12, 1948, that it hoped to load 1,000 tons on the "steamer Jane G. Swisshelm leaving New Orleans about August 23" (8a, 9a). Plaintiffs' first letter of credit was issued to Colorado August 19, 1948, and was in a sufficient amount to pay for the 1,000 tons. On August 26, 1948, Colorado cabled:

> "If shipment on the balance of $186,600 is to go out on present steamer must have completed credit arrangements immediately." (Pl. Exh. 1, Sched. AD, 46a, italics supplied.)

The credit arrangements were completed on the same day. However, the credits established by the plaintiffs (Appx. to Colorado Br. in C. A., pp. 39a, 41a), merely called for on board ocean bills of lading which might be of later date, evidencing shipment of caustic soda from *any* U. S. ports to Bombay in one or more shipments, and the District Court concluded that they extended the permissible shipping dates accordingly. Thus Colorado had the option of loading part of the soda on one or more properly selected vessels at any U. S. port

as late as September 22, 1948, and the remainder as late as October 10, 1948 (D. C. Op., 9a; C. A. Op., pp. 24, 27; *infra*).

The "booking" with Isbrandtsen for 1,000 tons on the S. S. *Jane G. Swisshelm* or other A-1 vessel had been obtained for Colorado by Farrell Shipping Co., its permanent sole freight forwarders at New Orleans, and specifically by the witness Becker, an officer thereof. Becker, on direct examination by Colorado's counsel, testified that he knew there would be a substitution for the *Swisshelm* "either at the time of the first booking or shortly thereafter" (61a). The exact vessel was not then known, but on August 17th, Isbrandtsen chartered the S. S. *Hawaiian* and the substitution thereof was on that day confirmed by Becker and the Colorado traffic department. In so doing, Colorado accepted a sailing date subsequent to the impending termination of the strike injunction, a critical factor not present in its previous arrangements regarding the Swisshelm. The scheduled sailing date of the Swisshelm had been August 28th-30th (12a). On August 19th, at Colorado's request, the caustic soda booking for the S. S. *Hawaiian* was verbally increased to 1,500 tons, with latest shipside delivery at New Orleans by September 2nd, 1948 (12a, 13a), the very day the maritime strike was to be resumed, absent an intervening settlement.

Plaintiffs-petitioners had no knowledge of the enjoined U. S. maritime strike (54a, 55a), and were given none by Colorado during the many exchanges. Moreover, they were never notified of the true terms made by Colorado for the *Swisshelm*, nor of the substittuion of the *Hawaiian* for the *Swisshelm*, nor of the deferred sailing date, so that under no circumstances could they be charged with notice of the shipping arrangements made unilaterally by Colorado.

Becker testified that when negotiating with Isbrandtsen for the *Swisshelm*, he had ascertained that she was under bareboat charter to Isbrandtsen (61a). But when he confirmed the substitution of the *Hawaiian*, he did not inquire as to her charter status, nor did Colorado's traffic department. He never admitted knowing who owned the *Hawaiian* or what type of charter existed. He maintained it was of no concern to him as he was dealing with shipping people in whom he had confidence (68a). He knew the difference between a bareboat charter and a time charter and he admitted that the fact that he was dealing with Isbrandtsen did not necessarily mean to him that Isbrandtsen was going to operate the vessel (70a). The question was then put by plaintiff's counsel (71a):

> "Q. So when you say you had no reason to wonder whether this strike you read about was going to affect this vessel, are you basing that on the fact that you did not know that American-Hawaiian was the owner of this vessel? A. I could base it on that fact, plus the fact that I did not know what type of charter was involved."

Incidentally, a later witness, Vice-President Crinkley of Isbrandtsen, testified that of some 60-80 vessels utilized by Isbrandtsen, at that time, only about ten were owned by it and the rest chartered (119a). It had no regular service from New Orleans or any Gulf ports to Indian or adjacent ports (118a, 120a). Isbrandtsen had booked this caustic soda as the nucleus of a cargo to be assembled (74a). There were regular lines which had no freight room at the time. (73a, 74a).

Significant also is Becker's admission that his conception of his duty was to obtain an ocean bill of lading and he would not be concerned with when or how the vessel would leave port unless his shipper instructed him, which Colorado did not do in this case (69a). He also testified that Colorado's traffic department usually

told him what ship to use on its steel shipments out of New Orleans (73a).

Becker also testified that from reading the New Orleans press reports, which are in evidence (Pl. Exh. 4, in part, 76a-92a), he formed the opinion about August 18, 1948, that there would be no strike at New Orleans (65a). These press reports show that, while the east and Gulf coast disputes were settled August 18, the west coast situation was not. An Associated Press dispatch carried on August 30th, before loading of the caustic soda began, reported an atmosphere of more than usual antagonism, in which a spokesman for the West Coast unions reaffirmed that their strike called for September 2nd, when the 80-day injunction would expire, would come off on schedule (85a). This announcement was reiterated in the press of August 31st (87a). The press of September 1st reported a planned railroad embargo of West Coast ports to prevent tie-up of freight cars, and that prospects of settlement between the operators and the five unions appeared slim (88a, 89a). At best, Becker had erroneously concluded that the East Coast settlements applied to a ship which he had neglected to ascertain was owned by a West Coast operator and crewed by a different set of unions having their strike negotiations on the West Coast.

The *Hawaiian* docked at New Orleans on August 31st, shortly after noon. At one P. M., on the same day, loading of the caustic soda commenced and was continued on September 1st, including overtime from 5 P. M. to 6 P. M. and on September 2nd, when it commenced an hour early, at 7 A. M. On September 2nd, the expired strike injunction was lifted at 10 A. M. by order of the District Court at San Francisco and the walkouts, which had commenced at midnight, September 1st, spread to all Pacific Coast ports (90a, 91a). At New Orleans only the *Hawaiian* and one other vessel were affected and rendered strikebound (D. C. Op., 19a).

The District Court found that all of the 1,490 tons of caustic soda with which the *Hawaiian* eventually sailed was loaded by 6 P. M., on September 2nd (15a). It further found (15a, 16a):

> "The smooth deck log of the Hawaiian shows that at three P. M. on September 2nd, the stewards' department left the ship to attend a union meeting and did not return to the ship until three A. M. on September 3rd, when they returned to remove their personal effects. At 3:15 A. M. on September 3rd, 1948, the stewards of the ship went ashore and were 'definitely on strike.' The loading of the cargo continued throughout the remainder of that night and until 10 A. M. in the morning. The engine room crew ceased working at that time, struck the vessel and refused to supply the steam necessary to drive the ship's winches so that cargo should be loaded."

Isbrandtsen thereupon declared the ship off hire and American-Hawaiian had her towed to anchorage where she remained strikebound and unable to be loaded or unloaded until December 9th, when the strike was settled. She remanned, refueled, went back on hire, resumed loading operations December 13th, and sailed from New Orleans December 19th, ultimately arriving at Bombay February 28, 1949 (27a, Ftnte. 92).

The District Court found that the bills of lading were issued by Isbrandtsen's agents to Colorado's agents at the latters' request on September 3rd at 9:30 A. M. (17a), and that they were mailed to Colorado at Denver on Friday, September 3rd. Monday, September 6th, was Labor Day (66a). On September 7th, Becker wired Colorado's traffic department about the strike delaying the *Hawaiian* (Col. Appx., 61a). Colorado wrote Becker September 10th for further details and Becker's answering letter was dated September 13th (Col. Appx., 60a-62a). In the meantime Colorado proceeded with the business

of negotiating the bills of lading. Sight drafts, accompanied by the bills of lading were presented to the bank at New York "on or about September 7, 1948" and each "was thereafter honored by said bank by the payment to The Colorado Fuel and Iron Corporation on or about September 13, 1948" of the sums called for (Stip., Col. Appx., 33a-35a). On September 20th, Colorado's New York office wrote plaintiffs-petitioners of the strike delay to the *Hawaiian*. The balance of the order was cancelled by an exchange of cables (48a).

Reasons Why the Writ Should be Granted.

A. An Important Question of Federal Law Remains to be Settled.

The opinions of the Courts below only compound the confusion in which the commercial world must operate during the 80-day injunctive period afforded to the president and the Federal Courts to restrain a maritime strike of national emergency proportions. Prior to the passage of the injunctive legislation, Congress had expressly exempted ocean carriers from loss or damage resulting from strikes or lockouts (46 U. S. C. A., § 1304 (2) (j); p.. 35, *infra;* cf. D. C. Op. 26a). Thus a shipper deals with a carrier in awareness of such exemption. No legislation protects the shipper. A manufacturer or seller of merchandise protects himself against strike interference with performance of his contract by bargaining for and obtaining an exculpatory strike clause and, in the absence thereof, non-performance or delay is not excused. *Normandie Shirt Co., Inc., v. C. K. Eagle,* 238 N. Y. 218, 144 N. E. 507, and authorities cited therein.

An exculpatory strike clause is strictly construed by the New York Court of Appeals. *William C. Atwater &*

Co., Inc., v. Panama R. Co., 255 N. Y. 496, 175 N. E. 189. In the absence of agreement a marine strike does not excuse non-delivery of goods. *Id., Companhia de Navigacao Lloyd Brasileiro v. C. G. Blake Co.*, 2nd Cir., 34 F. 2d 616.

Herein the District Court, while remarking that contractual strike clauses are "to be encouraged" (24a), not only refuses to make the rule absolute but evicts it entirely from the area of maritime strikes. The ultimate rationale of the District Court's decision is that all maritime strikes are unpredictable, especially in duration (23a), and the loss should remain where it happens to fall (25a). It lumps all strikes together, national emergency strikes with local waterfront disturbances (23a), despite the fact that Congress has charged the President and the federal Courts with the predictability of a national emergency strike and they have exercised their function so that all prospective shippers may know when such strike impends.

This refusal to apply to the situation the normal principles of contract law *would create a vacuum in the law on this subject,* a hands-off policy on the part of the courts which ill befits the realities of our highly unionized society.

Judge Hand, in his dissenting opinion in the Court of Appeals, suggests a workable distinction between strikes arising "unexpectedly after the contract of sale was made" and a situation such as ours (p. 30, *infra*). The majority opinion, however, makes confusion thrice compounded by misapplying contract law and rejecting its own prior decisions, as we shall see.

B. Conflicts between the Second Circuit on the One Hand and the United States Supreme Court and the New York Court of Appeals on the Other.

1. *Basic Contract Law.*

Realizing that the strike which immobilized the S. S. *Hawaiian* was fully foreseeable and predictable but its duration was not, the Court below would allow the shipper to put the goods aboard and take a chance "that it would be a brief strike" (p. 28, *infra*). Thus, he may take the chance but not assume the risk that it would be a long strike.

This Court has long since dealt with the subject of foreseeable risks overhanging the performance of a contract. If such a risk was within the contemplation of the promisor, it does not matter that it eventually caused damage in an unusual way, unpredictable in detail. *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 429, 25 S. Ct. 84, 49 L. Ed. 269. Nor does it matter that the nature and extent of the damage be far beyond the promisor's expectation. *Day v. U. S.*, 245 U. S. 159; 38 S. Ct. 57, 62 L. Ed. 219. "The answer to the objection of hardship in all such cases is that it might have been guarded against by proper stipulation." *The Harriman*, 76 U. S. 161, 173; 19 L. Ed. 629; *Carnegie Steel Co. v. U. S.*, 240 U. S. 156, 165, 36 S. Ct. 342, 60 L. Ed. 576; *Sun Printing Co. v. Moore*, 183 U. S. 642, 22 S. Ct. 240, 46 L. Ed. 366.

In *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*, 253 N. Y. 194, 179 N. E. 383, it was held that a middleman must have disclosed to his customer the infirmities of his arrangements with his supplier and have obtained an exculpatory clause to escape liability. The New York Court of Appeals stated (Cardozo, C. J.):

"So far as the record shows, it (defendant) puts its faith in the mere chance that the output of the refinery would be the same from year to year, and finding its faith vain, it tells us that its customer must have expected to take a chance as great. We see no reason for importing into the bargain this aleatory eleme t" (at p. 199, citing *Day v. U. S.* and *Northern Pacific Ry. Co. v. American Trading Co., supra*).

It is settled in New York that, where the risk is foreseeable, and not guarded against in the contract, the promisor takes responsibility for a bad outcome, however optomistic his expectations. *Raner v. Goldberg*, 244 N. Y. 438, 155 N. E. 734; *Farlou Realty Corp. v. Woodsam Associates, Inc.*, 49 N. Y. Supp. 367, aff'd 268 App. Div. 975, aff'd 294 N. Y. 846, 64 N. E. 2d 396; *119 5th Avenue, Inc., v. Taiyo Trading Co., Inc.*, 73 N. Y. Supp. 2d 774, 776; *Kramer v. Uchitelle, Inc.*, 288 N. C. 467, 472, 43 N. E. 2d 493, 495, 141 A. L. R. 1497; *Robitzek Investing Co., Inc., v. Colonial Beacon Oil Co.*, 265 App. Div. 749, 753, 40 N. Y. S. 2d 819, 822; *Id.*, 291 N. Y. 831, 50 N. E. 2d 555; Williston on Contracts, Rev. Ed., §§1938, 1939, 1955; Restatement, Contracts, §§288, 458.

The majority opinion of the Court of Appeals, in allowing the seller to gamble on a short strike, has also extended the final shipping date under the contract. In so doing, it violates an elementary principle of contract law in such manner as to make the decision a potential source of great mischief. The two letters of credit (Col. Appx. 39a-42a) were in the respective sums of $239,000 and $186,600. Colorado drew $212,743.67 on the one and $104,631.86 on the other (Col. Appx. pp. 33a, 35a). By making one shipment only and drawing on both letters of credit, Colorado obviously accepted the earlier of the two shipping dates in the letters of credit, September 22nd, rather than the later date, October 10th (Cf. D. C. Op. 9a).

Colorado could not unilaterally extend a letter of credit nor can the Court of Appeals vary the terms of a contract. (*The Harriman, supra.*) Having done so, however, the Court goes on to measure the seller's performance against these varied terms, holding (p. 28, *infra*):

> "• • • the seller could nevertheless reasonably entertain the belief in good faith at the time of loading that the vessel would depart by the second week in October. The duty defined in *Ledon v. Havemeyer, supra*, 121 N. Y. 179, 24 N. E. 297, was accordingly satisfied."

This error affects the application of the Court's own theory of permissible chance-taking so materially as to call for a reversal on that ground alone.

2. *Application to the Law of Shipment.*

The Court then remarks that the buyer could have done no more to speed the goods on their way had it been present and representing its own interests. Could it not have sought a ship at another port at greater expense to Colorado? Could not the contract have simply been cancelled with respect to these 1490 tons as was done with the remaining 510 tons? There was no categorial necessity for Colorado to make its profit by shipment, especially in a market it knew to be declining.

The Court continues in the same vein of error, always on the assumption that the seller must ship and if he cannot make normal and proper arrangements he may make do with whatever is available. This is not the New York law. Cf. Dissenting Op. p. 30, *infra*; *Miller v. Harvey*, 221 N. Y. 54; *Eppens v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13. The Second Circuit has previously agreed with *Eppens v. Littlejohn* so that it appeared to be settled

that inability to find a ship suitable to the cargo, difficult through it be, with room to stow it properly and not subject to abnormal delays, did not excuse the seller from either non-performance or delayed performance. *Companhia De Navigacao Lloyd Brasileiro v. C. G. Blake Co.*, 2nd Cir., 34 F. 2d 616; *Madereinse Do Brasil S/A v. Stulman-Emerick Lumber Co.*, 2 Cir., 147 F. 2d 399, Cert. De. 325 U. S. 861, 65 S. Ct. 1201, 89 L. Ed. 1982. The recognized exception is a supervening cause of an unexpected or catastrophic nature, such as the attack on Pearl Harbor and our consequent entrance into a war previously confined to the European nations. *L. N. Jackson & Co., Inc., v. Royal Norwegian Government*, 2nd Cir., 172 F. (2d) 694.

Admitting that Colorado could escape liability for non-delivery only if the catastrophe which prevented performance was not foreseeable, the Court in its last paragraph holds that it was never necessary for the seller to establish the impossibility of its performance because the plaintiffs failed to satisfy the Trial Court that the seller breached its contract. As Judge Hand points out, with many citations, this was merely a conclusion of law and not a finding of fact of the Trial Judge. This deprives the point of virtue even as a technicality. The issue of foreseeability of the strike was a central one at the trial and all that Colorado could prove it did prove thereon, as is evident from both the lower court opinions. The reasoning is circuitous. Whether the Court intends to make a new and unwarranted distinction between non-delivery and delay cases is not clear. The cases cited in this section of this petition show no distinction of that nature and no difference in the duty of selection of a vessel for shipment whether the sales contract have a C. I. F. term or not.

The cases we have cited grant no legal concessions to a seller who undertakes to sell and ship a difficult cargo for a price against foreseeable obstacles. The nature of the cargo points up the shipping problems he has assumed. Here Colorado had made no arrangements whatever to ship the balance of the 2000 tons it agreed to sell plaintiffs and obviously took the risk of not being able to perform its contract at all.

For commercial purposes, the buyer may expect the arrival of the goods in the length of time after loading thereof that an ordinary departure and an ordinary voyage would take, accident and perils of the sea excepted. *Lamborn v. Log Cabin Products Co.*, D. C. Minn., 1923, 291 Fed. 435; *Armour Grain Co. v. Compagnie Generale Trans-Atlantique*, 26 F. 2d 739, affd. 26 F. 2d 741; *Tobias v. Lissberger*, 105 N. Y. 404; *Connell Bass Co. v. Diederickseu & Co.*, 9th Cir., 213 Fed. 737; *Commercial Union v. Anglo-South Amer. Bank Ltd.*, 2nd Cir., 16 F. 2d 979.

3. *Conflict With the New York Law of Good Faith.*

The finding is that Colorado's agent Becker, had actual knowledge on September 3rd that the S. S. *Hawaiian* was strikebound and communicated such knowledge to Colorado September 7th, not necessarily prior to its presentation of the bills of lading and supporting documents to the bank on September 7th for negotiation against the letters of credit. Ignoring the fact that the formalities took until September 13th, when checks were issued to Colorado, the Court holds that Colorado did not have actual knowledge at the time of negotiations and that actual rather than constructive knowledge is required (p. 29, *infra*).

This conflicts with the New York law. Whatever is notice enough to excite attention, and put a party upon his guard and call for inquiry, is notice of everything to

which such inquiry might have led. Failure to investigate will not absolve one from imputed knowledge of all the investigation might have disclosed. *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597; *Fidelity & Deposit Co. v. Queens County Trust Co.*, 226 N. Y. 225, rvrsg. 174 App. Div. 160, 159 N. Y. Supp. 954; rearg. den., 226 N. Y. 711; *First National Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459; *Application of Reinhardt*, Surr. Ct., Kings Co., 202 Misc. 424, 114 N. Y. S. 2d 208; *Skinner v. Norman*, 165 N. Y. 565.

In fact, one who fails to see the obvious or to investigate the doubtful may be held liable for fraud and deceit, even where there is lacking deliberate or active fraud. *Kramer v. Joseph P. Day, Inc.*, 26 N. Y. S. 2d 734; *State Street Trust Co. v. Ernst*, 278 N. Y. 104, 112.

C. The Second Circuit's Interpretation of a Federal Statute Should be Reviewed.

In the same discussion the Court below extends its requirement of actual knowledge to the statute, 49 U. S. C. 114 (c), which states that one negotiating a bill of lading warrants "That he has knowledge of no fact which would impair the • • • worth of the bill." Obviously the worth of the bills was impaired when the vessel was strikebound and the market declining and the bills could be further negotiated, at their value absent the strike, only by perpetrating a similar fraudulent concealment on an innocent third party. They were negotiated at New York, where the law of "good faith" makes constructive knowledge applicable, in accord with the law elsewhere. Moreover, the Court has seen fit to repudiate its salutary dictum in *Ocean S. S. Co. v. U. S. Steel Products Co.*, 2 Cir., 239 F. 823, 826; cert. den. 244 U. S. 652; and constrict the healthy principles of *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 2nd Cir., 27 F. 2d 129.

D. The Status of a Freight Forwarder and the Nature of His Trade Practices Require Review.

The Court below held in *L. N. Jackson & Co. v. Royal Norwegian Government*, 2nd Cir., 177 F. 2d 694, that a shipping agent was charged with inquiring and knowing whether a foreign vessel had registered under the U. S. Ship Warrants System in effect during World War II and imputed the knowledge not only to the agent but to his principal. Here it declines to impute even the agent's actual knowledge to the principal (p. 29, *infra*), a clear reversal.

It allows the seller's duty to the buyer to be delegated to an agent even against a showing that the agent was not informed of the sales contract or the duty thereunder.

It accepts the agent's uncertain concept of his duty to shippers as ending when he delivered bills of lading, without requiring the shipper to take over from there.

Assuming the agent was adequately deputed to select a ship during the strike injunctive period, the Court allows him to leave the selection altogether to an interested carrier free of strike responsibility, which Judge Hand denounces as an "irresponsible subinfeudation of authority."

Both Courts below have given undue weight to a local so-called trade practice of non-inquiry, indulged by a freight forwarder and his friends, the agents of a carrier from whom he also receives commission. It likewise honors his concept of his duty as limited to obtaining a bill of lading as being an apparent personal trade practice. It also honors the trade practice of the carriers to continue booking cargo in the face of an impending strike. That may well be the practice that best befits their business, free as it is from strike responsibility. Their stock

"optimism" is a necessary public attitude to induce business at such times and is part of the "trade practice." None of this can determine the rights of a buyer and seller.

Actually, no trade practice is applicable to this case because it was the first time a Taft-Hartley enjoined strike situation arose. New legislation invalidates old trade practices in any industry. A new situation requires reasonable new measures. *The T. J. Hooper*, 2nd Cir., 60 F. 2d 737. A trade practice whereby a shipper relies on a carrier who does not accept the responsibility and considers it the shipper's own problem, is a worthless practice leaving a vacuum of responsibility to the innocent consignee. This is not a matter which should be left obscure and only the highest court can effectively deal with it.

E. The Issues Herein are of Primary Importance to Domestic Commerce and International Trade.

Such importance is self-evident. Moreover, the decision of the Court below unsettles various sound legal concepts, creating new potential sources of doubt and litigation.

CONCLUSION.

WHEREFORE, petitioner respectfully requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

DUNN & ZUCKERMAN,
Attorneys for Petitioner.

JAMES F. DUNN,
MORTON ZUCKERMAN,
Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 328—October Term, 1956.

(Argued April 5, 1957 Decided May 29, 1957.)

Docket No. 24016.

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, Ltd., a copartnership d.b.a. Mulkraj Brothers and Badhwar,

Plaintiffs,

v.

THE COLORADO FUEL AND IRON CORPORATION, ISBRANDTSEN COMPANY, Inc., and AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Defendants.

Before:

CLARK, Chief Judge, and
HAND and LUMBARD, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, Judge.

Plaintiffs, a partnership of Lucknow, India, appeal from a decision, D. C. S. D. N. Y., 138 F. Supp. 595, dismissing on the merits their action for damages for the delayed delivery, because of a strike, of a shipment of caustic soda from New Orleans to Bombay, brought against the seller, the carrier, and the owner of the vessel upon which shipment was made. Affirmed.

James F. Dunn, of Dunn & Zuckerman, New York City, for plaintiffs.

Francis S. Bensel, of Kelley, Drye, Newhall & Maginnes, New York City (W. Frederick Knecht, of Kelley, Drye, Newhall & Maginnes, New York City, on the brief), for defendant The Colorado Fuel and Iron Corporation.

Woodson D. Scott, of Lord, Day & Lord, New York City, for defendant Isbrandtsen Company, Inc.

Edward J. Heine, Jr. (L. DeGrove Potter, of Kirlin, Campbell & Keating, New York City, on the brief), for defendant American-Hawaiian Steamship Company.

CLARK, Chief Judge:

This appeal presents interesting issues concerning the duty of an American seller under a C. I. F. contract to select a suitable ship to carry goods to a foreign buyer on the eve of an impending strike. The facts are fully stated in the reasoned opinion of the district court, D. C. S. D. N. Y., 138 F. Supp. 595; and so we shall limit ourselves to a summary statement. In early August, 1948, The Colorado Fuel and Iron Corporation agreed to sell the plaintiffs 2,000 tons of caustic soda C. I. F. Bombay. Part of this merchandise was to be shipped from a Gulf port by September 22, 1948, the last day on which one of the

buyer's import licenses was valid. The 1,490 tons in controversy were loaded abroad the S.S. Hawaiian in New Orleans by September 2, and the documents of title were delivered to the buyer's New York bank on September 7. But on September 3 the ship's crew went on strike, and the vessel did not leave New Orleans until some three months later. The Indian buyers brought this action, based on the diverse citizenship of the parties, against the shipper, the carrier, and the vessel owner to recover damages for loss of market caused by the late delivery; and the chief question on appeal is whether Colorado breached its contract. The district court found no breach. We agree with its conclusion and accept its findings of fact.

The United States District Court for the Northern District of California on June 14, 1948, temporarily restrained, and later enjoined, a threatened maritime strike of the East, Gulf, and West Coasts, under the national emergency provisions of the Labor Management Relations Act of 1947, 29 U. S. C. §141, *et seq.* The injunction was to expire at midnight September 2 at the end of an 80-day cooling-off period. During the summer, settlement negotiations were conducted; and the maritime industry was sufficiently optimistic as to the prospects of settlement that New York and New Orleans freight forwarders continued to book freight for September sailings. Colorado's New Orleans freight forwarder entered into an affreightment contract with Isbrandtsen Company, Inc., July 29, 1948, whereby Isbrandtsen was to transport 1,000 tons of canstic soda from New Orleans to Bombay on the S.S. Jane G. Swisshelm or other A-1 vessel, the scheduled sailing date being August 28-30, 1948. Shipping companies were reluctant to handle caustic soda, and Isbrandtsen was the only carrier found by the freight forwarder willing or able to undertake shipment.

Under the contract of affreightment shipside delivery was required between August 19 and 25. On August 17, Isbrandtsen exercised its right to substitute the S.S. Ha-

waiian, an A-1 vessel, for the S.S. Jane G. Swisshelm, with latest shipside delivery September 2, 1948. Upon receipt of this advice Colorado had the tonnage covered by the contract increased from 1,000 to 1,500 tons. Becker, secretary-treasurer of the New Orleans freight forwarder, testified that on or about August 18 he learned that the Gulf and East Coast disputes had been settled; and he had formed the opinion that there would be no strike at New Orleans. He did not know that the substituted vessel had a West Coast crew, since he was not advised by the carrier's agent and made no inquiry of his own; it was not the custom or practice of the port to do so. Becker testified further that he dealt with Isbrandtsen, which he considered reliable, and not with the persons from whom Isbrandtsen chartered ships. Consequently he did not know whether the S.S. Hawaiian was under time or bareboat charter or the identity of its owner.

Loading began at 1:00 P. M., August 31, within an hour after the ship docked at Westwego Wharf, and continued overtime. On September 2, at 3:00 P. M., while the injunction was still in effect, the stewards left the ship to attend a union meeting, but did not strike. Three hours later the last of the caustic soda was on board and the ship was loading other cargo. At midnight the injunction expired. At 3:15 A. M. the stewards went on strike, the first the ship's master knew that any of his crew would walk off. At 10:00 that morning the engine-room crew joined the strike, cutting off the steam to the winches and ending further loading operations. While the strike continued it was impossible to do anything with respect to loading or unloading the cargo or sailing from port.

The seller's freight forwarders, not knowing of the work stoppage, paid the freight at 9:30 A. M., September 3, receiving two bills of lading which they mailed to Colorado that day, a Friday. On the Tuesday after Labor Day, September 7, the bills were presented to the bank in New

York for payment. Becker learned of the strike in the early afternoon of September 3, but did not inform Colorado of it until September 7 because "the situation was very unclear on September 3rd • • •. It was a temporary situation and we were trying to see how it would progress, and then • • • there was a long week end occasioned by the Labor Day holiday." 138 F. Supp. 595, 604. Colorado's general traffic manager was surprised by Becker's wire late September 7 or September 8, and his assistant wrote for an explanation. Colorado learned the full story on September 13 and informed the buyer of the facts one week later.

There is no dispute that delivery of the bills of lading on September 7 was timely. But the seller in such circumstances is also obligated to the buyer to put the goods aboard a vessel "in good faith • • • having reason to suppose she would sail within a reasonable time after shipment." *Ledon v. Havemeyer*, 121 N. Y. 179, 186, 24 N. E. 297. "Shipment" occurred on September 2 when the caustic soda was loaded on board; what constitutes a reasonable delay before sailing depends on the particular contract of sale. *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13. Since documents of title could be presented as late as September 22, shipment on September 22 would not be improper; and it is to be expected that a vessel will take additional time to load other cargo if the shipper is not supplying a whole cargo. *Ledon v. Havemeyer, supra*, 121 N. Y. 179, 24 N. E. 297. Thus the buyer would certainly have had no complaint had the S.S. Hawaiian sailed September 23. From the exchange of cables and letters which constituted the contract of sale it appeared that part of the goods could be put on board as late as October 9, suggesting that the buyer fixed the September 22 deadline because that was the expiration date of its import license, and not because it feared an immediate market drop. From all this Colorado could properly assume that

the buyer would be satisfied with a September 23 sailing, and would accept an October 11 sailing if necessary.

Even if we ascribe to the seller knowledge that the ship had a West Coast crew, the seller could nevertheless reasonably entertain the belief in good faith at the time of loading that the vessel would depart by the second week in October. The duty defined in *Ledon v. Havemeyer, supra*, 121 N. Y. 179, 24 N. E. 297, was accordingly satisfied. Moreover, Colorado, as we see it, did everything to speed the goods on their way that the buyer could have done had the latter been on the spot and representing its own interests.

The contract with Isbrandtsen made on July 29 was as good a contract as could be had at the time. There was no reason then to be suspicious of a possible substitution of another A-1 vessel. When on August 17 Colorado confirmed the substitution of the S.S. Hawaiian there was still no reason to reject a ship because it had a West Coast crew; the East Coast and Gulf settlements were still in the future, and one crew seemed no more likely to strike than another. Later when it appeared that West Coast crews were less desirable than others, there was no alternative course open which promised more likelihood of prompt sailing. If Colorado broke its contract to use the S.S. Hawaiian and sought another ship with a Gulf or East Coast crew, there was virtually no chance of obtaining space promptly. There was evidence that it takes considerable time to book space for a cargo of that size and that other lines were unwilling to handle caustic soda. Refusing to load until the strike situation was clear involved the same disadvantages. It made far better sense to take a chance that the S.S. Hawaiian would not be struck or would be struck briefly. While it was foreseeable that there would be a strike, it was far less foreseeable that a maritime strike crippling the entire West Coast would last from September 2 past the first week in October; and in

the circumstances it was an intelligent business decision to load aboard the S.S. Hawaiian.

The plaintiffs' other major argument concerns Colorado's presentation of the bills of lading to the buyer's bank after the strike occurred. Plaintiffs cite a dictum in *Ocean S. S. Co. v. U. S. Steel Products Co.*, 2 Cir., 239 F. 823, 826, certiorari denied 244 U. S. 652, for the proposition that this constituted fraud. See also 49 U. S. C. §114(c), which states that one negotiating a bill of lading warrants "That he has knowledge of no fact which would impair the • • • worth of the bill." Assuming that the worth of the bills of lading was impaired by the strike, a fact which was not established below, it was still necessary to prove that Colorado did know of the strike at the time it negotiated the bills. Plaintiffs would have us impute the knowledge of Becker, secretary-treasurer of the freight-forwarding corporation, to Colorado, for it was shown that Becker learned of the strike late on September 3, four days before Colorado presented the documents of title. But Becker was under no duty to keep Colorado informed of strike developments, and consequently his knowledge cannot be imputed to Colorado. 1 Restatement, Agency §275 (1933). Becker's original deposition indicated that he kept abreast of strike developments and notified shippers if they materialized, but at trial he insisted that his duty to shippers ended when he delivered bills of lading. The trial court accepted his later version, and we cannot say that this finding was clearly erroneous.

Inasmuch as Colorado conducted its freight forwarding through an independent contractor whose reliability is not questioned, and only two vessels in the whole port of New Orleans were affected by the West Coast strike, it cannot properly be charged with constructive notice of the strike before the time Becker cabled the news on September 7. Moreover, we think actual, rather than constructive, knowledge is required in such circumstances. *Fenold v. Green*,

2 Cir., 175 F. 2d 247; *Bank of Otterville v. Bank of Booneville*, 223 Mo. App. 572, 16 S. W. 2d 702.

Plaintiffs also named as defendants Isbrandtsen and the owner of the S.S. Hawaiian; but the claims against them, if any, are barred by the one-year statute of limitations in the Carriage of Goods by Sea Act, 46 U. S. C. §1303(6). *Commercio Transito Internazionale, Ltd., v. Lykes Bros. S. S. Co.*, 2 Cir., April 29, 1957.

In their briefs the plaintiffs treat the present case as one in which a seller fails to perform and then attempts to establish the defense of impossibility. In such cases the seller has the burden of proving the defense, which often amounts to establishing that the catastrophe which prevented performance was not foreseeable, e. g., *L. N. Jackson & Co. v. Royal Norwegian Government*, 2 Cir., 177 F. 2d 694, certiorari denied 339 U. S. 914. Here, however, the plaintiffs failed to satisfy the trial court that the seller breached its contract; consequently it was never necessary for the seller to establish the impossibility of its performing.

Affirmed.

HAND, Circuit Judge (dissenting):

We should distinguish between a failure to deliver the cargo at all, and a failure to make timely delivery (in this case on board a ship, September 22). The seller did indeed make delivery under §127(1) of the New York Personal Property Law and at common law, by laying the cargo alongside the ship, and it is also true that this delivery was in season to conform to the date fixed in the contract which was September 22. Nevertheless, it was not such a delivery as the parties contemplated because the ship did not break ground on or about September 22; hence it was not the stipulated performance. If the strike had arisen unexpectedly after the contract of sale was

made, perhaps it would have excused the defendant's failure to perform; but, at the time, the situation was such that a West Coast strike might well be resumed after September 1 when the injunction expired; and, that being true, the defendant took the risk that it would be unable to perform. *Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (C. A. 2). Compare *L. N. Jackson & Co. v. Royal Norwegian Government*, 177 F. 2d 694 (C. A. 2). If a seller makes a "reasonable" contract with the carrier "on behalf of the buyer," that the ship will break ground on the stipulated day I will assume that under §127(2) this would be performance, though she does not do so. However, in the case at bar it was not "reasonable" to assume that the ship selected would be free to break ground on September 22; she might or she might not; no one could tell. That was not enough to absolve the defendant from the implied agreement that it would select a ship, free on September 22. It was fully charged with notice that the ship was from the West Coast and that the strike on that coast had not been settled. It had deputed Becker to select the ship, and Becker had left its selection altogether to Isbrandtsen, an irresponsible subinfeudation of authority. Even a casual inquiry as to whether the ship selected was within the still strike-bound zone, would have disclosed the risk imposed on the plaintiff.

Incidentally Judge Ryan's conclusion that the contract was "reasonable" is not a "finding of fact," reversible only if it is "clearly erroneous"; in a case tried to a judge it is a "conclusion of law."*

I would reverse the judgment and remand to ascertain the damages arising from the delay.

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* *Barbarino v. Stanhope S.S. Co.*, 151 F. 2d 553 (C. A. 2); *Great Atlantic & Pacific Tea Co. v. Brasileiro*, 159 F. 2d 661; *Kreste v. United States*, 158 F. 2d 575, 577; *Guerrini v. United States*, 167 F. 2d 352, 355 (C. A. 2); *Johnson v. United States*, 168 F. 2d 886 (C. A. 2); *Lynch v. Agwilines, Inc.*, 184 F. 2d 826, 828 (C. A. 2); *Bonnewell v. United States*, 170 F. 2d 411, 412 (C. A. 4); *Dale v. Rosenfeld*, 229 F. 2d 855, 858 (C. A. 2).

APPENDIX B.

UNITED STATES COURT OF APPEALS,

For the Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of May one thousand nine hundred and fifty-seven.

Present:

Hon. Charles E. Clark,
Chief Judge,

Hon. Learned Hand,
Hon. J. Edward Lumbard,
Circuit Judges.

R. S. Dass Badhwahr, *et al.*, Plaintiffs-Appellants, v. Amr.-Hawaiian S.S. Corporation, Defendant-Appellant, Colorado Fuel & Iron Corporation, *et al.*, Defendants-Appellees.	Civ. 62-10

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO
Clerk

A true copy.

A. Daniel Fusaro
Clerk.
(Seal)

APPENDIX C.

Statutes Involved.

Sections 209 and 210 of the Labor Management Relations Act of 1947, 61 Stat. §§155, 156, 20 U. S. C. §§179, 180, read as follows:

"179. (a) Whenever a district court has issued an order under section 178 of this title enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this chapter. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

180. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action."

Section 4 of the United States Carriage of Goods by Sea Act, 49 Stat. 1210, 46 U. S. C. 1304, reads in part as follows:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

• • • • • •

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;"

Section 114 of 49 U. S. Code, part of a chapter headed "Bills of Lading," reads as follows, in part:

"A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) • • •

Section 127 of the New York Personal Property Law reads as follows:

"1. Where in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section one hundred, rule five, or unless a contrary intent appears.

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit."

Section one hundred, Rule 5, referred to in Section 127 (1), reads as follows:

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

Office - Supreme Court, U.S.
FILED
SEP 27 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 391

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

Plaintiffs-Petitioners,

against

THE COLORADO FUEL AND IRON CORPORATION,

Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FRANCIS S. BENSEL,
Counsel for Respondent,
70 Broadway,
New York 4, N. Y.

HENRY E. KELLEY,
W. FREDERICK KNECHT,
of Counsel.

INDEX

PAGE

STATEMENT OF THE CASE 1

A. Nature of the Action 1

B. The Issue Involved 2

C. Facts 3

D. The Decisions Below 7

ARGUMENT:

POINT I—As between plaintiffs and Colorado, the one dispositive issue was whether, as a matter of local New York law, Colorado had breached its contract. The courts below both correctly decided, in conformity with applicable and well established New York law, that there was no breach 9

POINT II—Colorado having been held to have performed its contract and thus having had the absolute right to receive payment against presentation of the bills of lading, no question under the Federal Bill of Lading Act was, or is, presented 15

CONCLUSION 17

Table of Cases Cited

PAGE

A. Klipstein & Co. v. Dilsizian, 273 Fed. 473 (C. A. 2d), cert. den. 257 U. S. 639 11

Diamond Alkali Export Corporation v. Fl. Bourgeois [1921], 3 K. B. 443, 449 16

Dwane v. Weil, 199 App. Div. 719, 730-1 (1st Dept.), affd. 235 N. Y. 527 ..... 11, 17

Harper v. Hochstim, 278 Fed. 102 (C. A. 2d) 11

In re an Arbitration between Weis & Co., Ltd. and Credit Colonial et Commercial (Antwerp), [1916] 1 K. B. 346 17

Ledon v. Havemeyer, 121 N. Y. 179, 184 13

Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F. 2d 399, 402 (C. A. 2d), cert. den. 325 U. S. 861 11

Matter of Bullard, 210 App. Div. 476 (1st Dept.), affd. 240 N. Y. 388 11

Mee v. McNider, 109 N. Y. 500 ..... 11, 17

Ocean S.S. Co. v. United States Steel Products Co., 239 Fed. 823, 826 (C. A. 2d), cert. den. 244 U. S. 652 17

Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, 27 F. 2d 129 (C. A. 2d), cert. den. 278 U. S. 618 17

Seaver v. Lindsay Light Co., 233 N. Y. 273 10

Smith Co., Ltd. v. Moscahlades, 193 App. Div. 126 (1st Dept.) 10, 17

Vietor v. National City Bank, 200 App. Div. 557, 565 (1st Dept.) 16

Warner Bros. & Co. v. Israel, 101 F. 2d 59 (C. A. 2d) 11, 17

STATUTES CITED

PAGE

FEDERAL (POMERENE) BILL OF LADING ACT, 49 U.S.C.:

§ 83 16

§ 106 16

§ 110 16

§ 114 (c) 8, 15, 16

TAFT-HARTLEY ACT, 29 U.S.C.:

§ 141, et seq. 5

UNITED STATES CARRIAGE OF GOODS BY SEA ACT, Section 3(3), 46 U.S.C.:

§ 1303(3) 16

IN THE

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OCTOBER TERM, 1957

No. 391

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

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THE COLORADO FUEL AND IRON CORPORATION,

Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Petitioners' statement of the case (Petition, pp. 5-12) is inadequate and misleading. It ignores significant facts and explicit findings of the District Court, which the Court of Appeals unqualifiedly accepted (Petition, p. 25), and does not accurately state the issue tendered and decided below. A brief statement of the facts involved is, therefore, necessary to a proper determination of the petition.

Statement of the Case

A. Nature of the Action

This action was brought by plaintiff-petitioners (hereinafter called "plaintiffs") for the recovery of damages for breach of a c.i.f. contract of sale by reason of the alleged

improper and delayed shipment to them at Bombay, India, of some 1,490 tons of caustic soda (Isb. Appx. 3a-13a).[1] Joined as defendants were the respondent, The Colorado Fuel and Iron Corporation (hereinafter called "Colorado"), the seller of the caustic soda; Isbrandtsen Company, Inc. (hereinafter called "Isbrandtsen"), the ocean carrier engaged by Colorado to transport the cargo from New Orleans, Louisiana, to Bombay; and American-Hawaiian Steamship Company (hereinafter called "American-Hawaiian"), the owner of the vessel, to wit, the *S. S. Hawaiian*, which Isbrandtsen chartered for the voyage and upon which the caustic soda was loaded and shipped.

The gravamen of plaintiffs' claim against Colorado was that Colorado breached its contract with them by wrongfully and improperly causing or permitting the caustic soda to be loaded aboard the *S. S. Hawaiian* at the Port of New Orleans at a time when it knew, or should have known, that said vessel was about to become immobilized by a strike of its unionized crew, as it thereafter did, and could not reasonably be expected to depart in the ordinary and usual time and manner (Isb. Appx. 3a-12a).

B. The Issue Involved

On the trial, it was stipulated that the contract of sale sued upon by plaintiffs was made in the State of New York and should be construed in accordance with the law of New York (Isb. Appx. 47a-48a).

Accordingly, as between plaintiffs and Colorado, the sole issue was whether, on the facts and as a matter of local New York law, Colorado had performed or breached its contract with plaintiffs.

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[1] Figures in parentheses, unless as in this instance otherwise indicated, refer to pages of the appendix to respondent's brief in the United States Court of Appeals.

C. Facts

Early in August, 1948, Colorado agreed to sell plaintiffs 2,000 tons of caustic soda at a price of 9½ cents per pound, c.i.f. Bombay, India, payable by irrevocable letter of credit in favor of Colorado, with shipment to be made from a Gulf port in one or more lots on or before September 22, 1948 (31a-32a, 37a; Pls.' Appx. 5a-8a).

Thereafter, on August 19, 1948, plaintiffs caused an irrevocable letter of credit to be opened by The National City Bank of New York for $239,000 and, on August 26, 1948, plaintiff, Badhwar, caused a further irrevocable letter of credit to be opened by said bank for $186,000 (32a-33a, 39a-42a). Under the first of these credits (which was subsequently amended on August 25, 1948, so as correctly to designate Colorado as the beneficiary thereof [33a; Pls.' Appx. 43a, 46a]) payment was to be made against on board bills of lading, dated at the latest October 10, 1948, evidencing the shipment of 1,000 tons of caustic soda (39a-40a), and by the second of the credits payment was to be made against like bills of lading, dated at the latest September 22, 1948, evideneing the shipment of the balance of the caustic soda (41a-42a). The District Court found (Pls.' Appx. 9a), as did the Court of Appeals by its acceptance of such finding (Petition, p. 25), that the first of the two credits effected a modification of the contract to the extent of permitting shipment of part of the caustic soda, *i.e.*, 1,000 tons, to be made as late as October 10, 1948, rather than on or before September 22, 1948, as initially specified.

When the contract was made, Colorado had a contract of affreightment with Isbrandtsen dated July 29, 1948, for the transportation of 1,000 tons of caustic soda from New Orleans to Bombay on the *S. S. Jane G. Swisshelm*, or other A-1 vessel, the scheduled sailing date of which was August 28-30, with shipside delivery required between

August 19-25, 1948 (Pls.' Appx. 11a-12a).[2] This contract had been procured by Colorado through its local New Orleans freight forwarder, Farrell Shipping Company (hereinafter called "Farrell"), and admittedly had to be obtained well in advance of shipment both because of the large size and bulk of the cargo (12a-14a) and because of the difficulty in booking space for caustic soda due to the reluctance of shipping companies to handle a material possessing its undesirable physical characteristics (Pls.' Appx. 12a).

Under the right reserved to it by its contract, and because the *S. S. Jane G. Swisshelm* would not be available for the voyage, Isbrandtsen, on August 17, 1948, substituted in lieu thereof the *S. S. Hawaiian*, concededly an A-1 vessel, with latest shipside delivery at New Orleans by September 2, 1948 (19a; Pls.' Appx. 12a). When advised of this substitution and the added time for shipside delivery, Colorado arranged to have the tonnage increased from 1,000 to 1,500 tons (Pls.' Appx. 12a-13a).

Thereafter, between August 20 and 27, 1948, Colorado shipped some 1,490 tons of caustic soda from its plant at Ladora, Colorado, to New Orleans (28a, 47a; Pls.' Appx. 13a), where it was delivered into Isbrandtsen's custody (Isb. Appx. 117a-127a; Pls.' Appx. 13a). Meanwhile, the *Hawaiian* arrived at New Orleans, where it docked on August 31st (Pls.' Appx. 13a). Loading of the caustic soda aboard the vessel was thereafter begun, continued on September 1st and completed by 6 P. M. on September 2nd (Pls.' Appx. 13a-15a).

At 3:15 A. M. on September 3rd the *Hawaiian's* stewards left the ship and went on strike (Pls.' Appx. 15a). However, loading of other cargo continued throughout the remainder of the night and until 10 o'clock in the morn-

[2] It is to be noted that no credit arrangements were made by plaintiffs prior to August 19th and that they were not completed until August 26, one day after the last date fixed for shipside delivery.

ing, at which time the engine room crew struck the vessel, with the result that it was thereafter impossible either to load any further cargo or to remove the cargo of caustic soda that already had been loaded and place it aboard another vessel (Pls.' Appx. 16a, 19a-20a).

At 9:30 A. M. on September 3rd, Farrell, then having no notice or knowledge of the work stoppage of the *Hawaiian's* stewards, delivered Colorado's check for $32,848.72 to Isbrandtsen's shipping agent in payment of the ocean freight charges and at the same time received two on board bills of lading which were on the same day, a Friday, mailed by it to Colorado (26a, 48a-49a; Pls.' Appx. 17a). On Tuesday, September 7th (the intervening Monday being Labor Day [26a]), Colorado presented sight drafts, together with the bills of lading and other documents required by the letters of credit, to The National City Bank of New York which were thereafter paid by said bank (33a-36a, 39a-42a).

The strike which immobilized the *Hawaiian* was an unusually prolonged one—lasting until December 7, 1948 (Isb. Appx. 87a-88a)—and was unexpected insofar as Farrell and Colorado were concerned. Although a threatened maritime strike on the East, Gulf and West Coasts had been enjoined in June, 1948, by two 80-day Taft-Hartley Act (29 U.S.C. §§ 1'1, *et seq.*) injunctions expiring at midnight September 2, 1948 (Pls.' Appx. 10a), the newspapers thereafter reported that collective bargaining negotiations were in progress between the affected unions and ship operators (Pls.' Appx. 10a). As a result, those connected with the maritime industry were optimistic that the disputes would be settled before the expiration of the 80-day period (Pls.' Appx. 10a-11a). The same optimism was shared by New York and New Orleans freight forwarders who, as the courts below both found (Pls.' Appx. 11a; Petition, p. 25), continued to do business as usual and to book freight for July, August and Septem-

ber sailings. Later, on August 18, 1949, this optimism was vindicated by the announcement in the press, including the New Orleans newspapers, that the threatened strike on the East and Gulf Coasts had been settled (64a; Pls.' Appx. 83a).

Despite the settlement the East and Gulf Coast labor disputes, the *Hawaiian* was struck some two weeks later at the Port of New Orleans. This happened as the result of the circumstance that the *Hawaiian* had been time chartered by Isbrandtsen from American-Hawaiian, a West Coast line, and was accordingly manned by a West Coast crew, the members of which belonged to various West Coast maritime unions which theretofore had failed to settle their differences with ship operators (Am. Haw. Appx. 35a-38a; Isb. Appx. 86a-87a, 91a; Pls.' Appx. 90a-91a). Only one other vessel in the Port of New Orleans was similarly affected (Pls.' Appx. 19a).

Prior to the strike, Farrell's officer, Becker, who handled the booking arrangement for Colorado (20a-20b), did not know that the *S. S. Hawaiian* was owned by American-Hawaiian (25a; Pls.' Appx. 13a, 17a). He testified that this was a matter which was of no concern to him since his business dealings were with Isbrandtsen who he considered to be a reliable company (25a-26a; Pls.' Appx. 13a). He further testified that while he had been told at the time of the making of the affreightment contract that the *Swisshelm* was under bareboat charter to Isbrandtsen, he was not informed of the type of charter covering the *Hawaiian* and that he made no inquiry with respect thereto as it was neither the custom nor the practice in the Port of New Orleans to do so (22a; Pls.' Appx. 13a, 61a). Conlon, a New York freight forwarder called as a witness by plaintiffs, corroborated Becker's testimony that it was not customary to inquire as to the type of charter made between ship operators and testified that he never made any such inquiry (10a, 16a).

Since Becker did not know that the *Hawaiian* was under time charter to Isbrandtsen or that American-Hawaiian was the owner thereof, he did not know, prior to the strike, that the vessel was manned by a West Coast crew or to what unions the officers and crew belonged (22a, 23a; Pls.' Appx. 13a, 17a). Prior to September 7th, Colorado also knew nothing about the crew or charter of the *Hawaiian* (28a, 29a, 55a-55b; Pls.' Appx. 13a, 18a).

Becker first learned of the strike in the early afternoon of September 3rd (22a, 26a; Isb. Appx. 56a; Pls.' Appx. 17a). However, he did not inform Colorado of it until September 7th for the reason that on September 3rd the situation was unclear and, with the long Labor Day week-end intervening, it was not until the 7th that he was able to ascertain that the strike was definitely on (26a, 61a).

Colorado was first apprised of the strike when its Denver Traffic Manager received Becker's telegram of September 7th (Pls.' Appx. 18a). Colorado wrote Farrell for an explanation and, upon being advised as to the cause of the strike, notified its New York export office accordingly (56a-57a) which, on September 20th, informed plaintiffs of the facts (Pls.' Appx. 18a). In reply, plaintiffs wrote Colorado on September 27th asking to be informed "when the strike is called off and the steamer sets sail" (Pls.' Appx. 43a, 47a).

On October 9, 1948, for reasons unrelated to the strike, plaintiffs cancelled the balance of the contract covering the unshipped tonnage (Pls.' Appx. 9a, 43a, 48a). Three months later, they for the first time complained of the delay (Pls.' Appx. 18a, 44a, 48a-49a).

D. The Decisions Below

The District Court, applying local New York law, held that due and proper shipment was made by Colorado when the caustic soda was loaded aboard the *Hawaiian* and that

since the contract between the parties was one for the sale of goods c.i.f. Bombay, all risk of delay was thereafter upon plaintiffs (Pls.' Appx. 20a-22a). The District Court further held that, even apart from the c.i.f. feature of the contract, any loss occasioned by the delay should be borne by plaintiffs since Colorado and Farrell both had acted in good faith and exercised reasonable business prudence and since Colorado, at the time the caustic soda was loaded, had no reason to believe that the vessel would not sail before the stipulated shipping dates (Pls.' Appx. 24a-25a). Judgment was accordingly entered dismissing the complaint on the merits as to Colorado (Pls.' Appx. 3a).

On appeal, the Court of Appeals, Judge Learned Hand dissenting, affirmed. The majority, in an opinion written by Chief Judge Clark, stated the issue before the court and the decision reached as follows (Petition, p. 25):

> "* * * the chief question on appeal is whether Colorado breached its contract. The district court found no breach. We agree with its conclusion and accept its findings of fact."

Having made this pronouncement, which was dispositive of the appeal, and having also thereby accepted the finding, implicit in the District Court's decision, that prior to September 3, 1948 neither Farrell nor Colorado knew, or could reasonably be expected to have known, that the *Hawaiian* would become strikebound, the majority went on to note that, even if it were assumed that Colorado was chargeable with such knowledge, it could not be charged with knowledge that the vessel would not sail by at least the latter of the two dates specified for shipment and that it could reasonably and in good faith have anticipated the contrary (Petition, pp. 27-28). The majority further noted that plaintiffs were entitled to no redress under the Federal (Pomerene) Bill of Lading Act (49 U.S.C. § 114 (c) [Petition, pp. 35-36]) by reason of the presentation by Colorado

on September 7th of the two bills of lading, first, because there was no proof that the worth of the bills of lading had been impaired by the strike, and, secondly, because Colorado at the time had no actual knowledge of the strike and could not be imputed with Becker's prior knowledge thereof as the evidence showed that his duty as Colorado's freight forwarder ended with the delivery of the bills of lading to Colorado on September 3rd (Petition, pp. 26, 29-30).

Judge Hand based his dissent on the proposition, contradicted by the evidence, that Colorado was "fully" charged with notice that the *Hawaiian* was from the West Coast and that the "strike" on that coast had not been settled and, from this premise, concluded that Colorado assumed the risk that the vessel might not sail before the date fixed for shipment (Petition, pp. 30-31). As already noted, both the District Court and the majority of the Court of Appeals found the fact to be otherwise and agreed that Colorado neither knew nor was charged with notice that the *Hawaiian* was owned by a West Coast line or manned by a West Coast crew.

POINT I

As between plaintiffs and Colorado, the one dispositive issue was whether, as a matter of local New York law, Colorado had breached its contract. The courts below both correctly decided, in conformity with applicable and well established New York law, that there was no breach.

Plaintiffs deal with this action as though it were immaterial that their contract with Colorado was for the sale of the caustic soda, c.i.f. Bombay. However, the fact is that the c.i.f. feature of the contract is of the utmost importance and required that the rights and obligations of the parties be determined by the well established rules of New York law applicable to c.i.f. contracts.

In *Seaver* v. *Lindsay Light Co.*, 233 N. Y. 273, the New York Court of Appeals stated (p. 276):

> "The meaning of the letters c.i.f. in an executory contract is, and at the time the contract in question was made were, well understood in the commercial world. They mean the cost of the merchandise, insurance thereon, and freight charges to point of destination. (*Thames & Mersey Ins. Co., Ltd.*, v. *U. S.*, 237 U. S. 19.) Unless there is something in a c.i.f. contract to indicate to the contrary, the seller completes his contract when he delivers the merchandise called for to the shipper, pays the freight thereon to point of destination, and forwards to the buyer bill of lading, invoice, insurance policy and receipt showing payment of freight."

Similarly, in *Smith Co., Ltd.* v. *Moscahlade*, 193 App. Div. 126, the New York Appellate Division, First Department, said (p. 129):

> "Under such contracts [c.i.f.] the seller fulfills all of his obligations by putting the cargo on board and forwarding to the purchaser a bill of lading and a policy of insurance of the kind then current and customarily issued in the trade, and if the goods had not been paid for in advance it was customary to present a draft for the purchase price accompanied by the bill of lading and policy of insurance and a credit slip for the insurance and freight if not actually paid for by the shipper, which documents were to be delivered to the purchaser on his paying the draft, and the insurance is for the protection of the purchaser, *who assumes all risks after the goods have been placed on board;* and this constitutes a delivery by the seller under such a contract and title thereupon passes to the buyer even though it be stated in the contract that delivery was to be made at the point of destination." (Italics ours.)

Likewise, in *Warner Bros. & Co.* v. *Israel*, 101 F. 2d 59, the United States Court of Appeals, Second Circuit, in stating the law of New York on this subject, said (p. 60):

> "Under a c.i.f. contract the seller receives a purchase price payable as the parties agree and for that consideration is bound to arrange for the carriage of the goods to their agreed destination, for insurance upon them for the benefit of the buyer, and either to pay the cost of the carriage and insurance or allow it on the purchase price. *When this has been done the seller has fully performed and is entitled to be paid upon delivery of the documents to the seller regardless of whether the goods themselves have arrived at their destination or ever will.*" (Italics ours.)

See also to the same effect:

Mee v. *McNider*, 109 N. Y. 500;
Dwane v. *Weil*, 199 App. Div. 719, 730-1 (1st Dept.), affd. 235 N. Y. 527;
Matter of Bullard, 210 App. Div. 476 (1st Dept.), affd. 240 N. Y. 388;
A. Klipstein & Co. v. *Dilsizian*, 273 Fed. 473 (C. A. 2d), cert. den. 257 U. S. 639;
Harper v. *Hochstim*, 278 Fed. 102 (C. A. 2d);
Madeirense do Brasil S/A v. *Stulman-Emrick Lumber Co.*, 147 F. 2d 399, 402 (C. A. 2d), cert. den. 325 U. S. 861.

The uncontroverted evidence here is that Colorado caused 1,490 tons of the caustic soda to be loaded aboard the *Hawaiian* prior to 6 P. M. on September 2, 1948, that on September 3rd, after payment of the ocean freight and prior to the strike of the engine room crew of the *Hawaiian*, it procured Isbrandtsen's two on board bills of lading covering the shipment, and that on September 7th it presented the bills of lading, together with its invoices

and appropriate certificates of marine insurance, to the bank designated by plaintiffs for that purpose. Accordingly, under the principles enunciated in the foregoing authorities Colorado did all it was required to do to perform its contract with plaintiffs, timely shipment was made on September 2nd, and any subsequent delay in transit was, as a matter of law, at plaintiffs' risk.

Notwithstanding the foregoing, plaintiffs contend that Colorado did not perform its contract and assumed the risk of delay because the strike of the *Hawaiian's* crew allegedly was foreseeable by it at or before the time of shipment. Plaintiffs do not state upon what facts they base this claim of foreseeability. However, as the proof is that neither Becker nor Colorado knew that the strike would occur, plaintiffs' contention must be that Becker, acting on behalf of Colorado, was under the duty to know that the *Hawaiian* was owned by a West Coast line and was under time charter to Isbrandtsen and hence manned by a West Coast crew belonging to West Coast unions and that, with this presumed knowledge and supposedly knowing that the threatened West Coast strike would not be settled, he should have known that the *Hawaiian's* crew would strike the vessel in New Orleans before it could sail from that port. Manifestly, any such proposition is untenable and was properly rejected by the courts below.

Since, as the uncontroverted proof established, Becker did not know and, by custom and practice, was under no duty to ascertain either the ownership of or type of charter covering the *Hawaiian* or the constituency of the vessel's crew, it follows that the courts below correctly refused to charge Becker and Colorado with, or to impute to them, knowledge that the *Hawaiian* was manned by a West Coast crew and with knowledge that such crew members belonged to West Coast unions. By the same token, it also follows that Becker, and through him Colorado, likewise could not be charged with knowledge, or with having

reasonable cause to believe, that the *Hawaiian* would be affected by the threatened West Coast maritime strike.

Plaintiffs' contention that the strike was a foreseeable risk is sheer sophistry. As is apparent, any such contention must rest on the premise that, because Colorado allegedly had notice that the 80-day injunction against the West Coast unions was due to expire on September 2nd, it was not only bound to conclude that a strike would occur immediately thereafter but was also bound to know that such strike would continue not only beyond September 22nd, the date fixed for shipment of part of the caustic soda, but also beyond October 10th, the date fixed for shipment of the remainder. Patently, any such proposition, as the courts below both held, is unsustainable.

First, no one could know whether the labor dispute would end in a strike. Secondly, it was, as it still is, a matter of common knowledge that most threatened strikes either do not materialize at all or are deferred pending further negotiations between the parties to the dispute. Thirdly, no seller could conceivably foretell, before a strike materialized, when it would occur, where it would occur and the duration thereof.

Upon all the facts, it is accordingly clear that when Colorado caused the caustic soda to be put aboard the *Hawaiian* it did so, to use the language of the New York Court of Appeals in *Ledon* v. *Havemeyer*, 121 N. Y. 179, 184, "with the intent, in good faith, to have [it] cleared for the port of destination, or in a reasonable time after the shipment," and that due and proper shipment was then made.

Realizing that the issue involved was correctly decided by the courts below in accordance with applicable New York law, plaintiffs attempt to sidestep this obstacle and to create the illusion of a reviewable conflict under Rule 19, subdivision 1(b), of the Rules of this Court, first, by assuming that Colorado failed to perform its contract and, then, by arguing that under the doctrine of frustration,

as enunciated by this Court and the New York Court of Appeals, the strike may not be proffered by Colorado (which it has not done) as an excuse for its assumed nonperformance (Petition, pp. 12-17). Of course, no such feigned and fictitious issue can, or does, present any question for review by this Court. The issue below was whether Colorado had breached its contract. The courts below both held it had not.

Plaintiffs advert to Judge Hand's comment on Becker's purported action, in permitting Isbrandtsen to substitute the *Hawaiian* for the *Swisshelm*, as amounting to an "irresponsible subinfeudation of authority." However, Judge Hand apparently overlooked the fact, as do plaintiffs, that this was a matter over which Becker had no choice or control, first, because the *Swisshelm* had become unavailable and did not call at the Port of New Orleans (19a) and, secondly, because Isbrandtsen, under its affreightment contract with Colorado, had the unqualified right to substitute any other A-1 vessel, and the *Hawaiian* concededly was such a vessel (51a; Isb. Appx. 58a). Accordingly, if Becker had rejected the *Hawaiian*, as Judge Hand implies he should, he not only would have effected a breach of contract but would have exposed his principal to liability for damages to Isbrandtsen.

In the circumstances of this case any loss occasioned by the strike logically and rightfully should be borne by plaintiffs. They intentionally made the purchase under a c.i.f. contract, declining a prior F.A.S. offer (Pls.' Appx. 5a, 45a), and knew that once the caustic soda was placed aboard a vessel at or before the time specified by them they thereupon would become the owners thereof and that all risk of delay thereafter would be theirs. Since, as the courts below both found, Colorado acted in good faith, this risk could not properly be shifted to it and was justly left where the contract and the New York law placed it.

POINT II

Colorado having been held to have performed its contract and thus having had the absolute right to receive payment against presentation of the bills of lading, no question under the Federal Bill of Lading Act was, or is, presented.

In the Court of Appeals, plaintiffs contended, again on the unfounded assumption that Colorado had not made shipment or performed its contract, that Colorado had no legal right to "negotiate" the bills of lading after the strike and that it committed a fraud in doing so. This argument, as the majority opinion of the Court of Appeals indicates, led to the consideration there given to the Federal Bill of Lading Act (49 U.S.C. § 114(c)).

In view of the Court of Appeals' affirmance of the District Court's determination that Colorado had performed its contract with plaintiffs, which necessarily constituted approval of the District Court's holding that proper shipment of the caustic soda was made prior to the strike, it is clear that no question under the Federal Bill of Lading Act was, or could be, presented. Stated otherwise if, as both courts held, Colorado performed its contract by making proper shipment, payment of the stipulated purchase price to Colorado was obligatory and no right of action under the Bill of Lading Act could possibly arise or exist.

It is elementary that when Colorado made shipment and paid the freight charges, it immediately became entitled to receive Isbrandtsen's two on board bills of lading. In fact, following Colorado's request, through Farrell, for delivery of the bills of lading (Pls.' Appx. 17a), their issuance and receipt was a matter of statutory mandate

and right under Section 3(3) of the United States Carriage of Goods by Sea Act (46 U.S.C. § 1303 (3))*.

The bills of lading received by Colorado evidenced, as was the fact, that shipment had been made, *i. e.*, they were documents which, as was stated in *Victor* v. *National City Bank*, 200 App. Div. 557, 565 (1st Dept.), in quoting with approval from *Diamond Alkali Export Corporation* v. *Fl. Bourgeois*, [1921] 3 K. B. 443, 449, " 'acknowledged actual shipment on board a particular ship'."

This attribute of the bills of lading was not impaired by the subsequent strike. It did not alter the fact that shipment had been made and that the bills of lading correctly evidenced that fact. Accordingly, the majority of the Court of Appeals correctly held that it had not been established "that the worth of the bills of lading was impaired by the strike" (Petition, p. 29).

Under each of the bills of lading, the caustic soda was consigned to the order of The National City Bank or assigns (Isb. Appx. 117a-118a, 125a.) Accordingly, they were both order bills of lading (49 U.S.C. § 83) and, as such, were negotiable or transferable, in the first instance, only by indorsement or delivery by The National City Bank (49 U.S.C. §§ 108, 110). It therefore follows that Colorado, in presenting the bills of lading to The National City Bank, neither could nor did negotiate or transfer the same within the meaning or purview of 49 U.S.C. § 114(c).

In the circumstances presented, it is apparent that the provisions of 49 U.S.C. § 114(c) never came into play, that no question was presented thereunder and that Colorado, as a matter of law, had the absolute right to present the

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* Section 3(3) of the United States Carriage of Goods Act (46 U.S.C. § 1303(3)), in part, provides:

> "After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading * * *."

bills of lading to The National City which was bound to accept the same and honor the accompanying sight drafts presented.

See:

Mee v. *McNider, supra,* 109 N. Y. 500;

Dwane v. *Weil, supra,* 199 App. Div. 719, 730-1 (1st Dept.), affd. 235 N. Y. 527;

Smith Co. Ltd. v. *Moscahlqdes, supra,* 193 App. Div. 126 (1st Dept.);

Warner Bros. & Co. v. *Israel, supra,* 101 F. 2d 59 (C. A. 2d);

In re an Arbitration between Weis & Co., Ltd. and Credit Colonial et Commercial (Antwerp), [1916] 1 K. B. 346.

For the above stated reasons, it also follows that Colorado committed no fraud in presenting the bills of lading and that the Court of Appeals accordingly did not, as plaintiffs assert (Petition, p. 19), either repudiate its dictum in *Ocean S. S. Co.* v. *United States Steel Products Co.,* 239 Fed. 823, 826 (C. A. 2d), cert. den. 244 U. S. 652, or constrict the principles of *Olivier Straw Goods Corporation* v. *Osaka Shosen Kaisha,* 27 F. 2d 129 (C. A. 2d), cert. den. 278 U. S. 618.

CONCLUSION

No question is presented for review by this Court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS S. BENSEL,
Counsel for Respondent.

HENRY E. KELLEY,
W. FREDERICK KNECHT,
of Counsel.